CRIMINAL CODE REFORM

HEARING

BEFORE THE

OVER-CRIMINALIZATION TASK FORCE OF 2014

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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FRIDAY, FEBRUARY 28, 2014

HOUSE OF REPRESENTATIVES

OVER-CRIMINALIZATION TASK FORCE OF 2014

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Task Force met, pursuant to call, at 9:01 a.m., in room 2237, Rayburn Office Building, the Honorable F. James Sensenbrenner, Jr. (Chairman of the Task Force) presiding.

Present: Representatives Sensenbrenner, Goodlatte, Bachus, Gohmert, Labrador, Conyers, Scott, Cohen, Johnson, Bass, and Jeffries.

Staff Present: (Majority) Robert Parmiter, Counsel; Alicia Church, Clerk; and (Minority) Ron LeGrand, Counsel.

Mr. SENSENBRENNER. The Over-Criminalization Task Force hearing will come to order, and without objection, the Chair is authorized to declare recesses of the Task Force at any time.

I will recognize myself for an opening statement. Good morning and welcome to the fifth hearing of the Judiciary Committee's Over-Criminalization Task Force. During its first 6 months, the Task Force conducted an in-depth evaluation of the over-criminalization problem. We held four hearings, focusing on the lack of a consistent and adequate mens rea requirement in the Federal code, and the problems associated with regulatory crime.

Earlier this month, the Committee took the important step of reauthorizing the Task Force for an additional 6 months. We intend to conduct hearings on a variety of topics, including penalties, overfederalization, and the perspectives of various executive and judicial agencies. Today's hearing will focus on criminal code reform.

The criminal code is a mess. Rather than a well-organized, systematic tool for enforcing important Federal criminal statutes, the code is riddled with provisions that are outdated, redundant, or simply inconsistent with more recent modifications to reflect today's modern approach to criminal law.

This is due, at least in part, to Congress' penchant for legislating in a vacuum in a politically popular manner, or in a rapid response to a crisis or a national news story, instead of thoughtfully and deliberately.

The resulting code is a vast chaotic, disorganized amalgamation of Federal criminal statutes that is difficult to use for practitioners and nearly incomprehensible for the average American. The size

and disorganization makes it extraordinarily difficult to ferret out the law applicable to a particular factual situation, which does a great disservice to the public.

Because we will be voting at 10:30 this morning, and I doubt anybody is going to come back after the votes, I am going to ask unanimous consent to put the rest of my statement into the record, and hope that other Members will do the same.

And with that, I will recognize the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, a code is defined as a systematic and comprehensive compilation of laws, rules, regulations that are consolidated and classified according to subject matter. What we refer to as our criminal code is anything but systematic.

Taking a clue from the Chair, we have asked the Congressional Research Service to give us the most accurate and current count of the criminal provisions in the code. Their initial response is that is too hard to do. We hope to hear from them in the near future.

But rather than take time to utilize evidence-based research in drafting criminal law legislation, we have responded in a knee-jerk fashion, charging ahead with the failed tough-on-crime legislation. In order to appease public opinion by addressing the crime of the day, we fail to use evidence-based approaches to fashion criminal penalties.

For example, we frequently use absurd mandatory minimums to address drug laws when we know that evidence has suggested that it is much more effective in treating and prevention, than mandatory minimums and long sentences.

Mr. Chairman, I look forward to the rest of the testimony, and I will put the rest of my statement in the record.

Mr. SENSENBRENNER. With the same hint that Mr. Scott has taken, I will recognize the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Sensenbrenner. I, too, will follow the leads that have been set out for me.

I just want to emphasize that we have an explosive growth of the Federal criminal code. We have counted 4,450 Federal crimes on the books.

And this hearing, among other things, is to determine how the criminal code should be modernized. And the cost, I have detailed here in my opening statement, and I will make some more comments about it.

And I will put the rest into the record, and I yield back the balance of my time.

Mr. SENSENBRENNER. I thank the gentleman.

Without objection, all Members' opening statements will appear in the record at this point.

[The prepared statement of Mr. Sensenbrenner follows:]

Prepared Statement of the Honorable F. James Sensenbrenner, Jr., a Representative in Congress from the State of Wisconsin, and Chairman, Over-Criminalization Task Force of 2014

Good morning and welcome to the fifth hearing of the Judiciary Committee's Over-Criminalization Task Force. During its first six months, the Task Force conducted an in-depth evaluation of the over-criminalization problem. We held four hearings, focusing on the lack of a consistent and adequate *mens rea* requirement

in the federal code and the problems associated with regulatory crime. Earlier this month, the Committee took the important step of re-authorizing the Task Force for an additional six months. We intend to conduct hearings on a variety of topics, including penalties, over-federalization, and the perspectives of the various Executive and Judicial agencies. Today's hearing will focus on Criminal Code Reform.

The federal Criminal Code is a mess. Rather than a well-organized, systemic tool for enforcing important federal criminal statutes, the Code is riddled with provisions that are outdated, redundant, or simply inconsistent with more recent modifications to reflect today's modern approach to criminal law. This is due, at least in part, to Congress's penchant for legislating in a vacuum, in a politically popular manner, or in rapid response to a crisis or national news story, instead of thoughtfully and deliberately. The resulting Code is a vast, chaotic, disorganized amalgamation of criminal statutes that is difficult to use for practitioners and nearly incomprehensible to the average American. This size and disorganization makes it extraordinarily difficult to ferret out the law applicable to a particular factual situation, which does a great disservice to the public.

Another major problem for the Code is the lack of clear, concise definitions; indeed, some scholars consider the real problem of over-criminalization to be qualitative, not quantitative. Last year, the Task Force encountered this problem with respect to the disparate and ill-defined criminal intent requirements scattered throughout the Code. However, *mens rea* is certainly not the only area where this is a problem. The Code is replete with undefined and inconsistently-applied terms. For example, the term "serious bodily injury" is used hundreds of times throughout the Code. However, there are at least two different definitions of this term. There are many instances where the term is undefined, or where the section refers the reader to another section of the Code, which criminalizes wholly unrelated conduct, for a definition of the term.

The Code also suffers from problems of redundancy. For example, the Supreme Court estimated in 1997 that there were at least 100 separate sections in the Code criminalizing false statements—and we know that the penalties imposed by these separate sections are all over the map. This redundancy means that two people may be punished differently under federal law for the same conduct, depending on which statute the government chooses to use. That is clearly not what Congress intended, and is a particular concern of mine.

Over the last several sessions of Congress, I have introduced legislation to consolidate and streamline the federal code. The Criminal Code Modernization and Simplification Act cuts more than one-third of the existing Criminal Code, reorganizes the Code to make it more user-friendly, and consolidates criminal offenses from other titles so that Title 18 includes all major criminal provisions. During its work on code reform, I hope the Task Force will carefully consider the drafting principles contained in H.R. 1860. The bill is a mere 1,200 pages, so it should be easy for the Task Force to vett it.

The issue of code reform is a worthy exercise for the Judiciary Committee and this Task Force. We have a responsibility to ensure that the criminal laws passed by this body—which can deprive citizens of life, liberty, and property—are carefully and thoughtfully drafted, and clearly identify the prohibited conduct.

I want to thank all the witnesses for appearing today, and especially want to welcome Mr. Volkov back to the Committee. I look forward to hearing your perspectives on this important issue.

[The prepared statement of Mr. Scott follows:]

Prepared Statement of the Honorable Robert C. "Bobby" Scott, a Representative in Congress from the State of Virginia, and Ranking Member, Over-Criminalization Task Force of 2014

Thank you, Mr. Chairman.

A "Code" is defined as, "a systematic and comprehensive compilation of laws, rules, or regulations that are consolidated and classified according to subject matter."

What we refer to as our criminal code is anything but systematic. It is neither thoughtful nor is it organized in a way that gives citizens fair notice of which behavior is lawful and which might land them in jail.

For years we and others have acknowledged that federal criminal law has dramatically expanded in size and scope over recent decades. We're very familiar with the history of this increase. Federal criminal law grew from 165 offenses in the year

1900 to 2,000 offenses by 1970, and then expanded to 4,000 federal crimes in 2003. By June 2008, 452 more criminal provisions had been added.

The problem has become so serious that the term, "over-criminalization" has been coined to describe how Congress has criminalized behavior that too often is not, by its very nature "criminal".

Truthfully, we don't really know the actual number of federal criminal provisions. We've asked the Congressional Research Service of the Library of Congress to give us their most accurate and current count of provisions in the Code, although their initial response was that it would be hard to calculate; we hope to hear from them in the near future, although their initial response was that it would be hard to calculate.

What we do know is that the current body of laws that we refer to as the Federal Criminal Code is overly broad and very often poorly defined. We have unnecessary and redundant federal crimes that overlap state criminal justice systems. They create a network of criminal statutes that exponentially increase citizens' exposure to prosecution with no regard to the crushing economic, human and societal costs of over-incarceration.

Too often we haven't considered these costs. Too often this increase or expansion in the Federal Criminal Code is an outcome of a politically expedient response to a public crisis or a tragic event. That crisis might be a surge in gang activity, a breakdown on Wall Street, or a perceived increase in misconduct or corruption on the part of public officials.

Rather than take the time to utilize evidence-based research in the drafting of legislation, we have responded in knee-jerk fashion, charging ahead with failed "tough on crime" determination in order to appease public opinion by addressing the crisis of the day. We have failed to use evidence based approaches to shape the penalties imposed. For example, we have frequently resorted to the use of absurd mandatory minimums and long sentences for drug possession when prevention and treatment consistently are found to be more effective than the drug war.

As a result, the United States imprisons more people per capita and in actual numbers than any nation on the planet. We have two and a half million people behind bars here. While the United States represents 5% of the world's population, we've got 25% of the world's reported prison population. While most of the world incarcerates at a rate of about 50–200 people per 100,000, the U.S. is the world's worst incarcerator with over 700 per 100,000. Research tells us, however, that anything over 500 per 100,000 is considered counterproductive. As a nation, we've made some very bad choices. We've adopted well-meaning, but wrong-headed policies that have turned America's criminal justice system into one over-ridden with slogans and sound bites that do nothing to reduce crime.

With all of the focus on "tough on crime" and "locking people up and throwing away the key", we've devoted too little attention to these policies' actual effect on crime and to the tragic and life-altering consequences that face individuals, families and communities after conviction.

It's time we pressed the "Pause" button and asked ourselves, "What is it that we seek to accomplish?"

Despite the differences we've encountered from time to time, as Members of Congress, we all share many of the same set of goals, and I believe that we're striving to fulfill the same responsibilities. For example, we want to:

- protect the safety of our fellow citizens and the security of our nation;
- safeguard the civil rights to which everyone in this country is entitled;
- prevent and combat violent crime, financial fraud, and threats to the most vulnerable members of society;
- improve the effectiveness of our criminal justice systems.

We've invited today's witnesses, all experts, to give us their thoughts about criminal code reform. How do we achieve reform? What should be the process? Who are the stakeholders to be included in the discussion? Is the creation of another commission necessary, similar to the Brown Commission created a few decades ago? What lessons can be learned from that and other commissions and task forces that have taken on this challenge in the past? Where do we begin?

In the Crime Subcommittee as well as in this Task Force we have discussed specific reforms suggested by various coalitions. Those suggested reforms have included recommendations that Congress establish a default criminal intent *mens rea* standard to assure that there is a criminal intent standard for any existing criminal provision that does not specify one. It's also been suggested that Congress provide writ-

ten analyses of, and justification for, all new or modified criminal offenses and penalties.

The recommendations further provided that, in order to avoid adding to the problems of over-criminalization, Congress should ask these hard questions before enacting new criminal laws:

- Do we need to enact more criminal laws at the federal level for a particular type of conduct, or would civil penalties accomplish our goals?
- Is there a valid purpose to be served by creating criminal law at the federal level when it duplicates an existing state level law?
- Would it be a better use of resources for the federal government to supplement state enforcement of criminal laws rather than replicating their efforts at the federal level?

And Congress should also be asking these same questions about the thousands of civil laws that can be found throughout the federal code.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

In past hearings, this bipartisan Over-Criminalization Task Force has recognized the explosive growth in the federal criminal code. We now have *more than 4,450 federal crimes* on the books.

More than 1,500 of these crimes are codified in Title 18 of the U.S. Code, and many others are scattered elsewhere, such as Title 8, which deals with immigration, and Title 21, which concerns controlled substances.

Today we consider whether and how the Criminal Code should be modernized.

In undertaking this task, however, there are several factors we should keep in mind.

To begin with, the financial ramifications of our Nation's criminal system should be considered.

Federal prisons currently house more than 200,000 people at an annual cost to taxpayers in billions of dollars.

More than half of these inmates, however, are serving time for drug offenses, many of which are non-violent. And, 11% of the prison population has been convicted of immigration violations.

We must also not forget the fact that the United States spends $51 billion annually on the "war on drugs" and its disproportionate impact on minorities.

It is clear that drug and immigration laws are very real contributors to over-criminalization and over-incarceration, all of which come with a huge cost.

Second, further clarification of the Criminal Code's *mens rea* requirements is needed.

For example, *17 of the 91* federal criminal offenses enacted between 2000 and 2007 lacked any *mens rea* requirement.

In the absence of such a standard, innocent individuals can be convicted for acts where it may not even be clear that a crime has been committed.

But the *mens rea* standard must be clear. Laws in the Criminal Code exist that provide so many paths by which *mens rea* can be evidenced for a single criminal act, that it becomes incredibly confusing to prosecutors and the courts to determine which standards must be met.

As Professor Julie O'Sullivan has written, and who I am happy to say will be able to shed more light on the subject today through her testimony, *the Code includes over 100 types of mens rea standards, which may not be applied uniformly even within a single statute.*

This has led to a massive expansion of prosecutorial discretion, which is one of the problems this Task Force has been created to address.

Lastly, the ever-expanding prosecutorial discretion inherent in the Criminal Code must be addressed.

Too frequently, the Code contains multiple statutes that have overlapping provisions for a single offense.

Often these overlaps provide different evidentiary requirements that must be proven to result in a conviction, some easier and some more difficult.

This allows prosecutors to cherry pick the statutes with which they will charge defendants, which will usually be those containing the easier to prove elements.

Even more concerning is that these vague and internally inconsistent criminal statutes regularly contain different maximum sentences for what would otherwise be considered identical crimes.

For instance, a defendant accused of destroying documents he or she knew would be subpoenaed by a grand jury can be charged under 18 U.S.C. 1503, 1512, 1519, or 1520, all of which have different evidentiary standards, and which have maximum sentences ranging between 10 and 20 years.

Accordingly, I look forward to hearing the testimony of our witnesses.

[The prepared statement of Mr. Goodlatte follows:]

Prepared Statement of the Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary

Thank you, Chairman Sensenbrenner. I am very pleased to be here at the first hearing of the Over-Criminalization Task Force following its reauthorization. I particularly appreciate your leadership on the issue of criminal code reform.

As we all heard last year, the U.S. Code currently contains an estimated 4,500 federal crimes, and Congress is adding new crimes at a rapid rate—approximately 500 per decade. The fact that this is only an estimate means that no one knows exactly how many provisions in the federal Code subject American citizens to criminal sanctions. The explosive growth of the Criminal Code is due in large part to what many have termed "legislation by accumulation," which means that Congress has simply accumulated new offenses for two hundred years or so, with little examination or reformulation of existing offenses. This has resulted in serious, chronic overlaps in coverage and irrationalities among offense penalties, which create new possibilities for disparity in treatment and for double punishment for the same harm or evil. This sort of "legislation by accumulation," or by anecdote, is undoubtedly contrary to Congressional intent, not to mention the fair administration of justice.

As Chairman of the Judiciary Committee, I have a particular interest in ensuring that the provisions in the Criminal Code are carefully and thoughtfully drafted. Last year, the House passed legislation to ensure that the criminal prohibitions against cigarette smuggling apply to the U.S. territories of American Samoa, Guam and the Northern Mariana Islands just as they do in the rest of the country. Without this fix, cigarettes sold in those territories without evidence that taxes were paid would not fall within in the definition of "contraband cigarettes." The House passed similar legislation last Congress, but it was not taken up by the Senate, so we had to pass it again this Congress. This legislation was necessary because something as simple as a general, uniform definition of the term "state" does not exist in title 18. This is an example of Congress having to go back and fix a problem it created by imprecise drafting. We should be able to be specific when drafting laws that affect Americans' fundamental liberties.

Additionally, many of the criminal offenses contained in Title 18 are not graded according to their relative severity. Distinguished scholars—including Professor Julie O'Sullivan of Georgetown University, who is with us today—have described this problem. For example, the statutory maximum penalty for violating certain sections of the Animal Welfare Act—five years—is the same as the penalty prescribed for female genital mutilation of girls under eighteen. The fact that these crimes are punished equally by the Criminal Code speaks volumes about the need for reform.

The Judiciary Committee has an excellent track record when it comes to careful and precise drafting, particularly with respect to the quality of criminal intent requirements. However, the federal Criminal Code, over which this Committee maintains jurisdiction, still suffers from severe problems of redundancy, overlap, and a lack of clear, consistent definitions. Under my leadership, this Committee is dedicated to ensuring that the legislation we produce employs clear and defined terms, and clearly outlines the conduct that is prohibited. The American people deserve no less.

I thank our distinguished panel of witnesses, and look forward to their testimony.

Mr. SENSENBRENNER. I will give abbreviated introductions of all of the witnesses. And without objection, the full text will be put in the record at this time.

[The information referred to follows:]

Witness Introductions:

Mr. Michael Volkov

Mr. Michael Volkov is the CEO of The Volkov Law Group, LLC. He has expertise in areas of compliance, internal investigations and enforcement matters.

Mr. Volkov spent 17 years as a federal prosecutor in the U.S. Attorney's Office for the District of Columbia. As an Assistant US Attorney, he had over 75 jury trials and extensive federal court experience. He also served on the Senate and House Judiciary Committees as the chief crime and terrorism counsel for the respective committees. In addition, Mr. Volkov served as a deputy assistant attorney general in the Office of Legislative Affairs of the U.S. Department of Justice (DOJ) and as a trial attorney in the DOJ's Antitrust Division.

Ms. Julie Rose O'Sullivan

Ms. O'Sullivan is the Associate Dean for the J.D. Program at Georgetown Law. She has written many articles and the leading casebook on white-collar crime and is a recognized expert on both the federal sentencing guidelines and white collar criminal law.

Ms. O'Sullivan clerked for Chief Judge Levin Campbell of the United States Court of Appeals for the First Circuit and then for Justice Sandra Day O'Connor of the United States Supreme Court. In 1991, following five years in private practice, Professor O'Sullivan joined the Criminal Division of the United States Attorney's Office for the

Southern District of New York as an Assistant United States Attorney. There, she spent most of her time prosecuting major white-collar crimes. She and another AUSA successfully prosecuted the largest bank fraud case in the country at the time and the first to be brought under the financial kingpin statute. Ms. O'Sullivan was then recruited by Robert Fiske, the newly appointed independent counsel for the Whitewater investigation, to join his staff as associate counsel. She worked for Mr. Fiske, and briefly for Ken Starr, before commencing her teaching career at Georgetown in 1995. Also in 1995, on appointment by the Supreme Court, she successfully briefed and argued a case on behalf of an indigent petitioner in a case pending before that Court.

Ms. O'Sullivan earned her Bachelor's degree from Stanford and graduated *summa cum laude* from Cornell Law School.

Mr. Roger A. Fairfax, Jr.

Mr. Roger A. Fairfax, Jr. is a Professor of Law at George Washington University Law School where he teaches and writes on criminal law and procedure, and criminal justice policy.

Mr. Fairfax formerly served as a federal prosecutor in the Public Integrity Section of the Criminal Division of the U.S. Department of Justice, and as a Special Assistant U.S. Attorney in the Eastern District of Virginia. He also practiced white-collar criminal and regulatory defense with the Washington, D.C. office of O'Melveny & Myers. Professor Fairfax clerked for Judge Patti B. Saris of the U.S. District Court in Massachusetts and for Judge Judith W. Rogers of the U.S. Court of Appeals for the D.C.

Circuit. Mr. Fairfax earned his bachelor's degree from Harvard College, his master's degree from the University of London, and his juris doctor from Harvard Law School.

Mr. John D. Cline

Mr. John Cline practices at the Law Office of John D. Cline in San Francisco, California. His practice focuses on federal criminal defense at the trial and appellate levels. He has tried criminal cases nationwide and has argued before a number of federal courts of appeals and the United States Supreme Court.

Mr. Cline graduated *magna cum laude* from the University of Texas School of Law. Following graduation, he served as law clerk to the Honorable Homer Thornberry of the United States Court of Appeals for the Fifth Circuit.

Over the course of his career, Mr. Cline has been a partner at several major law firms across the country. He opened his own practice in 2010.

Mr. Cline has represented defendants in a variety of federal criminal trials and appeals, including fraud and other white collar cases, national security cases, terrorism cases, and drug cases. He has also represented defendants charged with violent crimes in state and federal courts, including death penalty cases.

Mr. Cline served as co-counsel for the defense in United States v. Oliver L. North, United States v. Wen Ho Lee, and United States v. I. Lewis "Scooter" Libby, among other notable cases.

Mr. SENSENBRENNER. The first witness is Mr. Michael Volkov, who is the CEO of the Volkov Law Group, which has expertise in areas of compliance, internal investigation, and enforcement matters, and an alumnus of the staff of this Committee.

Ms. Julie Rose O'Sullivan is the associate dean for the J.D. program at Georgetown Law School. She has written many articles and has the leading casebook on white-collar crime, and is a recognized expert in both Federal sentencing guidelines and white-collar criminal law.

Mr. Roger Fairfax, Jr., is professor of law at G.W. University Law School, where he teaches and writes on criminal law and procedure, and criminal justice policy.

And finally, Mr. John Cline practices in the Law Office of John Cline in San Francisco. His practice focuses on Federal criminal defense at trial and appellate levels. He has tried criminal cases nationwide, and argued before a number of Federal courts of appeals and the United States Supreme Court.

I thank all of the witnesses for appearing. Without objection, your full statement will appear in the record.

The Chair would request that witnesses confine their testimony to 5 minutes. You all have experience with red, yellow, and green lights. You know what they mean.

Mr. Volkov, you are first.

TESTIMONY OF MICHAEL VOLKOV, CEO, THE VOLKOV LAW GROUP LLC

Mr. VOLKOV. Chairman Sensenbrenner, Ranking Member Scott, Ranking Member Conyers, and other Task Force Members, thank you for the opportunity to appear and testify before the Task Force.

First, let me say it is an honor to return to the Committee, where I worked on the staff for several years. I am very comfortable with addressing the Task Force Chair as Mr. Chairman. As a matter fact, he requires that, and I still do that, too.

It is also an honor to return to the Committee to appear before Ranking Member Scott, with whom I worked for many years on important criminal justice issues, debated a lot of issues.

And I am sure the Committee and you miss our colleague, Bobby Vassar, who contributed so much to the Committee's work.

My years on the Judiciary Committee staff were the highlight of my professional career, and I will always be grateful to all of you and to the Committee for the opportunity to serve the public.

Now I welcome the opportunity to address the Task Force on the important issue of Federal criminal code reform. This is an issue that is near and dear to my heart.

Mr. Chairman, you have led the charge on this issue by introducing over the last 4 years the Criminal Code Modernization and Simplification Act. Having worked as a staff member on this important legislation, I know the effort that is required to introduce this bill each year. It is a Herculean task. Your work represents an important bipartisan invitation and challenge to enact meaningful criminal code reform.

I want to take a moment to commend your former staff director, Phil Kiko, and I am sure there is no objection to that, hopefully.

Mr. SENSENBRENNER. Without objection, so ordered. [Laughter.]

Mr. VOLKOV. And Legislative Counsel Doug Bellis—he just appeared—and Legislative Counsel Doug Bellis, who both devoted significant time to this effort, as well as your staff in the last three congressional sessions.

We can all agree on one thing: The Federal criminal code, if left unchecked, will continue to resemble the United States Tax Code. That is not a good thing. In fact, it threatens any hope we have of equal justice.

Each year, a new edition of the current United States Criminal Code with a new color, or at least portions of it, is delivered to lawyers, congressional staff, and practitioners. Each year, it accretes new crimes, resembling the old Yellow Pages, if anyone here remembers those days.

I am reminded of one of my favorite scenes from a Marx brothers movie, "Duck Soup," when Groucho Marx is the president of the mythical country Fredonia. He is given a report by one of his ministers, who asked Groucho if he understands the report. Groucho replies, "Of course, I understand the report. Why, even a 4-year-old child could understand this report." Groucho looks down at that report, starts to read, and then says, "Run out and get me a 4-year-old child. I can not make head or tail of it." The same can be said about our Federal criminal code.

No one can make heads or tails of the code, except possibly—possibly—prosecutors, judges, and defense counsel. Our citizens have no idea the scope of Federal crimes, nor are they aware of the coverage of specific Federal crimes.

The Federal criminal code is unusable, unwieldy, and a maze of Federal criminal offenses, few of which are drafted consistently and even fewer of which provide clarity to law-abiding citizens.

The danger of the Federal criminal code is well known to the Task Force, as reflected in the title and the charter right here: "Over-Criminalization."

The Federal criminal code gives Federal prosecutors even more power and discretion to exercise against defendants. It enables them to manipulate the criminal justice system to charge similarly situated defendants with a variety of crimes.

Prosecutors can exercise this power without violating the double jeopardy clause of our Constitution. This is inconsistent with our commitment to equal justice.

Our Federal criminal code needs to reflect three clear principles. First, it must be written clearly. Second, it must be concise with a minimal use of clear and defined terms. And third, it must be accessible.

Right now, the Federal criminal code sits as a monstrosity that no one has the time or the inclination to tackle, much less understand.

The issue of reform is much more serious than references in the criminal provisions to prevent improper use of "Smokey Bear," "Woody Owl," or protecting the emblem of the Swiss Confederation.

As it now stands, the code is littered with criminal offenses that are used in the criminal justice system to obtain desired results without regard to Congress' intent.

The Over-Criminalization Task Force is at the right place and at the right time to advance revision of the Federal criminal code. I

urge you, as a former Federal prosecutor and now a defense lawyer, and an alum of the staff here, to recommend that the Federal criminal code be reviewed and revised with a goal of providing clarity, applying consistent drafting principles, and reducing the number and reach of Federal crimes in order to protect our constitutional system of justice and respect federalism.

First, let me just go over the principles that should guide any type of reform—and I appreciate the Chair's hammering, and I will submit my statement, obviously, for the record.

[The prepared statement of Mr. Volkov follows:]

Testimony of

Michael Volkov

The Volkov Law Group LLC

"Criminal Code Reform"

Before the Task Force on Over-Criminalization

The Judiciary Committee of the House of Representatives of the Congress of the United States

9:00 a.m. Friday, February 28, 2014

Rayburn House Office Building Washington, D.C.

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Chairman Sensenbrenner, Ranking Member Scott, and other Task Force members: Thank you for the opportunity to appear and testify before the Task Force.

Introduction

It is an honor for me to return to the Committee where I worked on staff for several years. I am very comfortable with addressing the Task Force Chair as "Mr. Chairman."

It is also an honor to return to the Committee to appear before Ranking Member Scott, with whom I worked for many years on important criminal justice issues. I am sure the Committee and you miss our colleague Bobby Vassar, who contributed so much to the Committee's work.

My years on the Judiciary Committee staff were the highlight of my professional career and I will always be grateful to the Committee for the opportunity to serve the public.

Federal Criminal Code Reform

Now, I welcome the opportunity to address the Task Force on the important issue of Federal Criminal Code Reform. This is an issue that is near and dear to my heart.

Mr. Chairman, you have led the charge on this issue by introducing, over the last four years, the Criminal Code Modernization and Simplification Act.

Having worked as a staff member on this important legislation, I know the effort that is required to introduce this bill each year. It is a Herculean task.

Your work represents an important bi-partisan invitation and challenge to enact meaningful federal criminal code reform.

I want to take a moment to commend your former Staff Director, Phil Kiko, and Legislative Counsel, Doug Bellis, who both devoted significant time to this effort, as well as your staff in the last three Congressional sessions.

The Federal Criminal Code is a Disaster

We all agree on one thing – the federal criminal code, if left unchecked, will continue to resemble the United States Tax Code. That is not a good thing – in fact, it threatens any hope we have of equal justice.

Each year, a new edition of the United States Criminal Code (or at least portions of it) is delivered to lawyers, Congressional staff and practitioners. Each year it accretes new crimes, resembling the old Yellow Pages, assuming anyone here remembers those days.

I am reminded of one of my favorite scenes from a Marx Brothers movie, "Duck Soup," when Groucho Marx is the President of the mythical country Freedonia, and he is a given a report by one of his ministers who asks Groucho if he understands the report.

Groucho replies, "Of course I understand the report. Why even a 4-year old child could understand this [report]." Groucho looks down at the report, starts to read, and then says, "Run out and get me a four year old child. I can't make head or tail out of it."

The same can be said about our federal criminal code. No one can make heads or tails of the code, except, possibly, prosecutors, judges and defense counsel. Our citizens have no idea the scope of federal crimes nor are they aware of the coverage of specific federal crimes.

The federal criminal code is unusable, unwieldy and a maze of federal criminal offenses, few of which are drafted consistently and even fewer of which provide clarity to law-abiding citizens on where the lines may be drawn on various complex crimes.

The danger of the federal criminal code is well-known to the Task Force as reflected in its title and charter: Over-Criminalization.

The federal criminal code gives federal prosecutors even more power and discretion to exercise against defendants. It enables them to manipulate the criminal justice system to charge similarly situated defendants with a variety of crimes. Prosecutors can exercise this power without violating the Double Jeopardy clause of our Constitution. This is inconsistent with our commitment to equal justice.

Our federal criminal code needs to reflect three clear principles:

First, it must be written clearly;

Second, it must be concise with a minimal use of clear and defined terms; and

Third, it must be accessible.

Right now, the federal criminal code sits as a monstrosity that no one has the time or the inclination to tackle, much less understand.

The issue of federal code reform is much more serious than references in criminal provisions to prevent improper use of "Smokey Bear" (Section 711); Woody Owl (Section 712); or protecting the emblem of the Swiss Confederation (Section 708).

As it now stands, the federal criminal code is littered with criminal offenses that are used in the criminal justice system to obtain desired results without regard to Congress' intent.

The Over-Criminalization Task Force is at the right place and the right time to advance revision of the federal criminal code.

I urge the Task Force, as a former federal prosecutor and now a defense lawyer, to recommend that the federal criminal code be reviewed and

revised with the goal of providing clarity, applying consistent drafting principles, and reducing the number and reach of federal crimes in order to protect our constitutional system of justice and respect for federalism.

The Task At Hand – Drafting a Basic Criminal Code As a Starting Point

I want to take a moment to outline some basic principles that I believe the Task Force should recommend to promote criminal code reform.

These principles will help to ensure that a bi-partisan, policy-neutral effort is achieved in order to bring about a good government solution – a clear, concise and accessible set of federal criminal statutes.

The Task Force should embrace the goal of creating a single document that compiles all of the federal criminal offenses in our system, including regulatory crimes. From this basic foundation document, policy changes, that is, changes to requisite intent, jurisdiction, punishment or other elements of the offense, can be accomplished with clarity and minimal drafting revisions.

Initial Principles for Revising the Criminal Code: Establishing a Consistent and Uniform Set of Terms and Definitions

Let me start with a profound grasp of the obvious – the drafting of a revised federal criminal code is not impossible. In fact, I believe that a basic criminal code for federal criminal offenses can be accomplished, despite Congress' prior failed attempts in the 1970s and 1980s to develop a federal criminal code. I recognize that Congress is not starting with a clean slate but has a historical legacy of fits and starts on this issue.[1]

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[1] In 1975, the first Senate bill was introduced in the 93d Congress as **S. 1,** 93d Cong., 1st Sess.(1973). In later congressional sessions, similar versions were introduced, see **S.** 1437, 95th Cong. 2d Sess. (1977), which passed the Senate in 1978 but failed in the House. In the 1980s

Perhaps I am naïve, but I am confident based on the bipartisan spirit of this Task Force, and under the leadership of Chairman Sensenbrenner and Ranking Member Scott, along with the support of Full Committee Chairman Goodlatte and Ranking Member Conyers, that the goal may be within reach.

The Task Force should consider soliciting detailed and specific recommendations on how to go about this process.

Once a basic and reformulated criminal code is created, the policy issues will quickly come into focus. The beauty of this process is that with a basic framework document, policy decisions can be implemented relatively easily and with minimal drafting.

A foundation criminal code should be based on the following principles:

1. Consolidation of Criminal Offenses in Title 18

Identify and consolidate all criminal laws in the United States Code in one Title under the jurisdiction of the House Judiciary Committee. There is no reason why criminal offenses should be spread throughout the United States Code; and there is every reason for a single committee, the House Judiciary Committee, to exercise consistent oversight of the criminal code, just like other statutory titles that are supervised by other Committees with primary jurisdiction.

It is entirely possible to gather and identify all of the federal criminal offenses, including regulatory crimes, without dedicating a SWAT team of lawyers, or invading regulatory agencies.

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the steam went out of efforts to adopt a comprehensive criminal code. See Norman Abrahams, Federal Criminal Law 67 (1986); For a brief history of the failure of federal criminal law reform in the 1970s, see Louis B. Schwartz, Criminal Law Reform, 2 Encyclo[[edia of Crime and Justice 513, 515 (1983).

2. Use of Historical Prosecution Data

Review prosecution data to determine which statutes are being used and which statutes are not. A prior review of such data for a ten-year period revealed some shocking news – a large number of criminal offenses are not used by prosecutors because they are outdated, drafted poorly and/ or unnecessary.

3. Eliminate Duplicative Criminal Laws

The criminal code contains numerous provisions that apply to the same "crime." There is no reason to expose a defendant to multiple counts of various crimes by charging multiple criminal offenses that are designed to deter and punish the same conduct.

4. Application of Consistent Terms and Definition

The criminal code is riddled with instances where the same term is defined differently, contains surplusage that has no meaning, or has been rationalized by judicial decisions akin to legislative harmonizing.

Willful: One Word with Many Meanings

Perhaps one of the best examples of the need for clarity and consistency centers on the use of the term "willful" to establish the requisite intent for a criminal act. In practice, the term "willful" has no consistent meaning and takes on a life of its own depending on the context in which it is used.

The Supreme Court has long recognized that willful "is a word of many meanings, its construction often being influenced by its context." *Spies v. United States*, 317 U.S. 492, 497, 63 S.Ct. 364, 367, 87 L.Ed. 418 (U.S. 1943); *Ratzlaf* v. *United States*, 510 U.S. 135, 149 (U.S. 1994); *Bryan v. United States*, 524 U.S. 184, 186, (U.S. 1998).

. See generally Note, An Analysis of the Term "Willful" in Federal

Criminal Statutes, 51 Notre Dame L.Rev. 786, 786-87 (1976).

The use of the term "willful" in a federal criminal statute often leads to legal challenges over whether Congress intended to require proof that a defendant violated a known legal duty. See, *e.g.*, *Bryan v. United States*, 524 U.S. 184, 196 (U.S. 1998) (the term "willfully" in 18 U.S.C. § 924(a)(1)(D) does not require proof that defendant actually knew of a federal licensing requirement); *Ratzlaf* v. *United States*, 510 U.S. 135, 149 (U.S. 1994) (holding that Congress intended, in 31 U.S.C. § 5322(a), that a jury must conclude that defendant knew that structuring currency transactions was prohibited by law before a conviction for a "willful" violation may occur).

The term "willful" is not the only criminal intent terms subject to consistent criticism. The terms "specific intent" and "general intent" create similar confusion. See *Liparota* v. *United States*, 471 U.S. 419, 433 n.16 (U.S. 1985) (commenting that a "useful" jury instruction might "eschew use of difficult legal concepts like 'specific intent' and 'general intent'"); accord *Staples v. United Statesl,* 511 U.S. 600 (U.S. 1994) (Stevens and Blackmun, dissenting, disagree with Majority's interpretation of the application of *Liparota* principles to present case).

It is no accident that drafters of the Model Penal Code got it right by banishing the terms "willfully," "specific intent," and "general intent." See *Dixon* v. *United States*, 548 U.S. 1, 16 (U.S. 2006) (noting that Section 2.02(2) of the Model Penal Code does not embrace the term "willfully" but instead defines "purposely," "knowingly," "recklessly," and "negligently").

As Judge Learned Hand, in an exchange with Professor Herbert Wechsler (the reporter for the Model Penal Code), put it: "[Willfully is] an awful word! It is one of the most troublesome words in a statute that I know. If I were to have the index purged, 'willful' would lead all the rest in spite of its being at the end of the alphabet." *United*

States v. *Aversa*, 984 F.2d 493 (1st. Cir. 1993), *vacated sub nom. Donovan* v. *United States*, 510 U.S. 1069 (U.S. 1994) (quoting American Law Institute, Model Penal Code § 2.20, at 249 n. 47 (1985)).

Courts have applied at least four different definitions of willful. The first defines "willful" as "knowing" (i.e., so long as the defendant is aware of his conduct and the nature of his circumstances); see, e.g., *United States v. McCalvin*, 608 F.2d 1167, 1171 (8th Cir.1979) ("knowingly and willingly" defined as "voluntarily and intentionally"); see also American Law Institute, Model Penal Code § 2.02(8) (1985).

The second definition of willful grew up in criminal tax cases – which equates willfulness with the violation of a known legal duty. See, e.g., *Cheek v. United States*, 498 U.S. 192, 200, (1991) (cited by both majority and dissenting opinion in *Ratzlaf v. United States*, 510 U.S. 135, 149, 156, (U.S. 1994)).

The two remaining definitions depend on the context in which the term is used, requiring a hybrid approach of defining willful as requiring an act with a bad purpose and permitting or barring a mistake of law defense. Compare, e.g., *Brown*, 954 F.2d 1563, 1568 (11th Cir. 1992) (ruling that knowledge of the antistructuring law was not required to ground a structuring conviction) and Scanio, 900 F.2d 485, 490 (2nd Cir. 1990) (same) with, e.g., *United States v. Eisenstein*, 731 F.2d 1540, 1543 (11th Cir.1984) (upholding mistake-of-law defense for currency import and export violations) and *United States v. Dichne*, 612 F.2d 632, 636 (2d Cir.1979) (similar), cert. denied, 445 U.S. 928, 100 S.Ct. 1314, 63 L.Ed.2d 760 (1980). See also *United States v. Dashney*, 937 F.2d at 532, 539-40 (10th Cir. 1991) (declaring mistake of law to be a defense in respect to violations of currency import and export regulations but not in respect to structuring offenses).

Conclusion

It has been 65 years since Congress enacted a revision of the federal criminal code.

The Task Force has an opportunity to recommend important steps to begin a meaningful rewrite of the federal criminal code.

Under the bipartisan leadership of this Task Force I am confident that you will take all necessary actions to promote and ensure meaningful criminal code reform.

Thank you for the opportunity to testify today.

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Mr. SENSENBRENNER. Without objection.
Ms. O'Sullivan?

TESTIMONY OF JULIE ROSE O'SULLIVAN, PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER

Ms. O'SULLIVAN. Thank you, Mr. Chairman, Ranking Member Scott, and the Task Force. I am honored to be invited to speak to you today about a topic about which I have written quite a bit. I feel a little bit like a weekend hacker advising the wizards on their defense. It strikes me as a little presumptuous for an academic to come and tell expert lawmakers how to revise a code. That said, you have invited me, so I am delighted to participate.

Thus far, those of us who have written in this field have witnessed a remarkable phenomenon in Washington; that is, the ACLU sitting cheek by jowl with the federalists and Cato and everybody else. Concerned groups on the left and the right agree that the code is broken, and it has to be fixed.

I do not think that there is real question about that any longer. The question is what is to be done.

I would imagine that this Kumbaya moment is going to be fleeting. I assume it will break down fairly quickly, once we start getting into the specifics of code revision, because the parties that are coming together now actually have very different underlying values.

So for example, the ACLU is principally concerned, as I understand it, with over-incarceration, racial equity, juvenile justice, and overly harsh drug sentencing. By contrast, I think a lot of the conservative groups who have made their voices heard are much more concerned with federalism issues, with the overabundance and vagueness of white-collar offenses, and with deficiencies in mens rea that permeate the code.

What does this mean? Two things. First, once the actual process of code reform begins, we are going to see a splintering, and the politics are going to become much more contentious. And second, in light of that, although it is arguable, it may be best to take the entire project on at once, so that those with different priorities will be forced to negotiate, horse trade, compromise, with the result that we actually get something done.

Prior efforts to reform the code ended in frustration, but they eventually bore fruit. I believe that the U.S. Sentencing Commission was created in part because one could not fix the code in the front end—that is, fix the actual code—so the decision was made to rationalize the back end, rationalize the punishment.

The issues surrounding sentencing are as contentious, if not more contentious, than formulating a criminal norm. But the Sentencing Commission was very successful in appearing bipartisan and expert. As part of its processes, it regularly called in experts and solicited the views of all stakeholders, and it still does.

Many people are unhappy with the guidelines, but that is the nature of the enterprise. We are not going to make everybody happy. For present purposes, what is really important is that the commission got the job done, that Congress, at least at that point, was unable to do. And it got the job done in a credible and expert fashion.

With this in mind, I urge lawmakers to create a permanent, expert, bipartisan body, perhaps this one, whose charge it is to overhaul and continuously respond to emerging issues and problems that percolate up from the courts. This type of body is essential to ensure a devotion to this difficult task that otherwise may well ebb and flow with political seasons, the tenure of committed Members of Congress, and the like.

It would also provide the means by which consultation with all stakeholders, and many experts could actually be institutionalized. And this kind of consultation strikes me as absolutely essential to the kind of credibility and viability of a revised code.

It would also ensure uniform drafting and consistent use of mens rea terms, and it would allow Congress to remedy much more promptly problems emerging in the application of the statute.

For example, this expert body no doubt would have advised Congress to respond sooner to problems with the honest services doctrine than the 20 years it took the Supreme Court to decide that all the people who—not all, but many of the people who went to jail for 20 years did not, in fact, commit a crime.

Obviously, how such a body is structured, financed, to whom it reports, the weight given its work product, and myriad other issues, would have to be resolved consistent with constitutional and practical constraints. But I think that code reform may well continue to be just a fond dream without such a permanent commitment to the code.

Thank you.

[The prepared statement of Ms. O'Sullivan follows:]

Prepared Statement of Julie Rose O'Sullivan, Professor, Georgetown University Law Center

For my written statement, which is an article entitled "The Federal Criminal 'Code' Is a Disgrace: Obstruction Statutes as Case Study," published in the Journal of Criminal Law and Criminology in 2006, please go to the following link:

http://www.federalwhitecollarcrime.org/pdf/criminal—Law—and—Criminilogy.pdf

Additional thoughts can be found in:

Julie Rose O'Sullivan, *The Federal Criminal "Code": Return of Overfederalization*, 37 Harv.J.Law & Public Policy 57 (2014).

Mr. SENSENBRENNER. Thank you very much.

Mr. Fairfax?

TESTIMONY OF ROGER A. FAIRFAX, JR., GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. FAIRFAX. Chairman Sensenbrenner, Ranking Member Scott, and Members of the Task Force, I thank you for the kind invitation to participate in this hearing on criminal code reform. And at the outset, I would like to voice my appreciation for the hard work and dedication of this Task Force, the Members of which are exhibiting exactly the kind of leadership and bipartisan cooperation necessary for the improvement of our Nation's criminal justice system.

I come to this topic as a former Federal prosecutor who has handled cases brought under the Federal criminal code, and as an at-

torney who has defended individuals and corporations charged under statutes in the code, and as a legal scholar who has dedicated much of his work to the improvement of our Nation's laws and the justice system.

And Members of this Task Force have been instrumental in exposing and responding to the deficiencies of the Federal criminal code. Of course, Chairman Sensenbrenner has introduced the Criminal Code Modernization and Simplification Act. In addition, Mr. Scott, when he was Chairman of the Subcommittee on Crime, Terrorism, and Homeland Security, held hearings soliciting views and concerns regarding the state of the Federal criminal code.

Many well-respected commentators have criticized the Federal criminal code for its excessive length, lack of organization, redundant provisions, and outdated offenses. There also have been calls for certain substantive changes to the code, such as the bolstering of mens rea requirements, the decriminalization of some regulatory and other offenses, and the reduction in the number of mandatory minimum sentences. Many of these and other critiques are quite persuasive, and there is no doubt that most observers would agree that the Federal criminal code is in need of reform.

However, before we contemplate how Congress might best streamline, reorganize, refine, and modernize the Federal criminal code, it is essential to draw lessons from past efforts.

The seeds of serious modern-day efforts at comprehensive code reform, Federal code reform, were sown in the 1950's and early 1960's by the American Law Institute's Model Penal Code, which with its technical precision, elegant organization and draftsmanship, and its attention to principles of culpability and mens rea, spurred many States to undertake significant revisions of their criminal codes.

With the Model Penal Code and President Johnson's 1965 crime commission as the backdrop, Congress established in 1966 the National Commission on the Reform of Federal Criminal Laws, commonly known as the Brown commission.

The 1971 final report of the Brown commission proposed a new Federal criminal code. This proposed code included a general part that set out definitions, defenses, principles for liability, and general standards for the exercise of Federal criminal jurisdiction.

The proposed code also featured a special part containing a comprehensive collection of all the Federal felony offenses.

Despite the Brown commission's tremendous efforts over 4 years, however, the proposed comprehensive Federal criminal code never was enacted into law, although there were repeated attempts in the House and the Senate over a period of almost 12 years.

So it may be time to revisit Federal criminal code reform. And to be sure, many of the challenges that face Congress after the Brown commission remain. Nevertheless, I believe that we do have a meaningful opportunity for reform, because today, a strong bipartisan consensus has been developing around the idea that we should be smart on crime.

And given the current receptivity to evidence-based innovation in criminal justice policy, the time may be ripe for reconsideration of Federal criminal code reform.

I do have a number of suggestions for consideration, if Congress were to contemplate embarking on an effort to revise the Federal criminal code.

The first is the establishment of a new broadly representative commission, just much like the Brown commission, to draft Federal criminal code reform legislation or to work with existing legislation, like Chairman Sensenbrenner's bill.

The second is a partnership with established and respected law reform entities, such as the American Law Institute or the ABA Criminal Justice Section, and the utilization of the technical assistance of members of the legal academy and experts in criminal justice policy community.

And third, the establishment of a permanent, professionally staffed criminal law revision commission in Congress that can assist Members and Committees with the technical analysis regarding the question of whether a contemplated new criminal law or penalty is actually needed, and also the design and drafting of criminal statutes so that they are well constructed and fit appropriately within the larger criminal code.

I believe that these ideas, derived from the work of individuals who have been involved in criminal code reform efforts for decades, are worthy of consideration. And if the Members have questions later, I will be happy to elaborate on any or all of these ideas and discuss how criminal code reform might fit into the larger bipartisan criminal justice reform agenda, responsive to concerns about over-criminalization.

[The prepared statement of Mr. Fairfax follows:]

Testimony of

Roger A. Fairfax, Jr.

Professor of Law

George Washington University Law School

on

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Introduction

Chairman Sensenbrenner, Ranking Member Scott, and Members of the Task Force, I thank you for the kind invitation to participate in this hearing on "Criminal Code Reform."

At the outset, I would like to voice my appreciation for the hard work and dedication of this Task Force. I was present at the markup when the Judiciary Committee established this Task Force and have been able to attend a number of its hearings. The members of this Task Force are exhibiting the kind of leadership and bipartisan cooperation necessary for the improvement of our nation's criminal justice system.

I come to this topic as a former federal prosecutor who handled cases brought under the federal criminal code, as an attorney who also has defended individuals and corporations accused of violating statutes in the federal criminal code, and as a legal scholar who has dedicated much of his work to the improvement of our nation's laws and justice system.

State of the Federal Criminal Code

Members of this Task Force have been instrumental in exposing and responding to the deficiencies of the federal criminal code. Of course, Chairman Sensenbrenner has introduced H.R. 1860, the Criminal Code Modernization and Simplification Act of 2013, the successor to his H.R. 1823, which was the subject of a hearing before the Subcommittee on Crime, Terrorism, and Homeland Security in December 2011.[1] In addition, when Mr. Scott was chairman of the Subcommittee on Crime, Terrorism, and Homeland Security, the Subcommittee held hearings during which he summarized the work that he and others had done to solicit the views and concerns of the legal and advocacy communities regarding the expansion and current state of the federal criminal code.[2]

My fellow panelist and esteemed colleague in the legal academy, Professor Julie O'Sullivan, has queried whether we can even characterize what we have as a "code" in the first

[1] *See* Criminal Code Modernization and Simplification Act of 2011, Hearing on H.R. 1823 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on Judiciary, 112th Cong. (2012).

[2] *See* Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on Judiciary, 111th Cong. (2010); *see also* Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on Judiciary, 111th Cong. (2010).

place.[3] Professor O'Sullivan joins other well-respected commentators who have criticized the code for its excessive length, lack of organization, redundant provisions, and outdated offenses.[4]

Critics often point to the fact that the federal criminal code has expanded exponentially over the past several decades, ballooning to more than 4,000 offenses, although an exact figure proves difficult to discern.[5] In addition, as expansive as Title 18 has become, even more offenses can be found in various other titles of the United States Code and in regulatory provisions.[6]

Others have cited the fact that Title 18 is organized in an arbitrary manner, with Chapters sequenced according to the alphabetization of subject matter headings.[7] Furthermore, the number of criminal statutes has grown with little, if any, regard to how the new laws fit within the existing framework of criminal prohibitions. Given the lack of a coherent structure and piecemeal approach to the adoption of new offenses, there are many examples of criminal statutes that overlap with others at best, and, at worst, are wholly redundant.

In this ever-expanding "hodge-podge" of criminal statutes, it is not surprising that there are laws on the books that are perceived to have fallen into desuetude.[8] Prohibitions and penalties that may have been appropriate in earlier eras still have the force of law and are unlikely ever to be repealed even if rarely enforced.

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[3] *See* Julie Rose O'Sullivan, *The Federal Criminal "Code": Return of Overfederalization*, 37 HARV. J. L. & PUB. POL'Y 57, 57 (2014) ("The federal criminal 'code'— to the extent one can call the United States' sprawling and disorganized mass of criminal legislation and regulations a 'code'—is a disgrace."); *see also* Robert H. Joost, *Federal Criminal Code Reform: Is It Possible?*, 1 BUFF. L. REV. 195, 195 (1997) ("Title 18 is a compilation, rather than a code.")

[4] *See, e.g.*, Robert H. Joost, *Simplifying Federal Criminal Laws*, 14 PEPPERDINE L. REV. 1, 8-13 (1986).

[5] *See* John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, FEDERALIST SOC'Y FOR LAW & PUB. POL'Y STUDIES 1 (2004); Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, WALL. ST. J., July 23, 2011.

[6] *See* O'Sullivan, *supra* note 3, at 57.

[7] *See, e.g.*, Joost, *Federal Criminal Code Reform*, *supra* note 3, at 195 n.4, 214. Unlike many state codes influenced by the Model Penal Code, Title 18 does not group related offenses in any systematic way. *See* Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 BUFF. CRIM. L. REV. 225, 233-24 (1997).

[8] *See id.* at 199.

There also have been calls – including those made during hearings before this Task Force – for certain substantive changes to the federal criminal code, such as the bolstering of mens rea requirements, decriminalization of some regulatory and other offenses, and the reduction in the number of mandatory minimum sentences.

Many of these and other critiques are quite persuasive and there is little doubt that most observers – even those who differ as to the level of urgency and feasibility – would agree that the federal criminal code is in need of reform.[9] Therefore, I will not dwell on the problems posed by the federal criminal code but, instead, will spend the time I have with you exploring some potential solutions.

Among the solutions the Task Force and Congress might consider are: (1) the establishment of a new commission to draft legislation or work with existing legislation, such as Chairman Sensenbrenner's bill proposing a new criminal code; (2) partnering with an established and respected law reform entity such as the American Law Institute or American Bar Association Criminal Justice Section, using the technical assistance of members of the legal academy and experts in the criminal justice think tank community; and (3) the use of a permanent, professionally-staffed "criminal law revision commission" in Congress that can assist Members and Committees with the technical analysis regarding whether a contemplated new criminal law or penalty is actually needed and the design and drafting of statutes so that they are well-constructed and fit appropriately with the larger code. I will elaborate on each of these suggestions in turn and will discuss how criminal code reform might fit into a larger criminal justice reform agenda responsive to concerns about over-criminalization and mass incarceration.

History of Reform Efforts

However, before we contemplate how Congress might best streamline, reorganize, refine, and update the federal criminal code, it is essential to examine and draw lessons from past efforts to do the same.

A week from today will mark the 67th anniversary of a March 7, 1947 hearing that took place before "Subcommittee No.1" of the House Judiciary Committee of the Eightieth Congress. One of the bills being considered by the Subcommittee was H.R. 1600, "A Bill to Revise, Codify, and Enact Into Positive Law Title 18 of the United States Code, Entitled 'Crimes and

[9] *Compare, e.g.,* Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1 (2012); Kathleen F. Brickey, *Federal Criminal Code Reform: Hidden Costs, Illusory Benefits*, 2 BUFF. CRIM. L. REV. 161 (1998), *with* O'Sullivan, *supra* note 3; Ellen S. Podgor, Foreword, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747 (2005).

Criminal Procedure.'"[10] The hearing record is replete with complaints about the state of post-World War II federal criminal law, including "ambiguities, uncertainties, duplication, redundancy, and conflict" and the need for "completeness and comprehensiveness, together with chapter and section arrangement which would disclose—not conceal—all vital provisions."[11] The statement of Eugene J. Keogh, a member of the House of Representatives, decried the disparities in prescribed criminal penalties that had resulted from "piecemeal legislation enacted to take care of a present situation and in a wave of emotion."[12]

In 1948, Congress passed the new Title 18, which, despite its shortcomings, was thought at the time to be a tremendous improvement over the previous state of affairs.[13] However, the seeds of serious modern-day efforts at comprehensive federal criminal code reform were sown by the American Law Institute's Model Penal Code project in the 1950s and early 1960s. The Model Penal Code, with its technical precision, elegant organization and draftsmanship, its attention to principles of culpability and mens rea, and its grounding in careful and serious

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[10] *See* A Bill to Revise, Codify, and Enact Into Positive Law Title 18 of the United States Code, Entitled "Crimes and Criminal Procedure": Hearing on H.R. 1600 Before Subcomm. No 1 of the House Comm. on the Judiciary, 80th Cong. (1947) [hereinafter Title 18 Hearing Report].

[11] Title 18 Hearing Report, at 12.

[12] Title 18 Hearing Report, at 7. Mr. Keogh had been chairman of the Committee of Revision of the Laws which, in the Seventy-Ninth Congress, had taken up H.R. 2200, a bill almost identical to H.R. 1600 with regard to substantive crimes. In the interim, the Committee on Revision of the Laws had been shuttered and the House Judiciary Committee assumed jurisdiction over the efforts to revise the United States Code. *See* Title 18 Hearing Report, at 1-2.

[13] *See* Act of June 25, 1948, c. 645, 62 Stat. 683. After the Civil War, Congress commissioned a compilation of federal statutes including criminal laws. *See* Act of June 27, 1866, ch. 140, § 2, 14 Stat. 75. This effort eventually culminated in the Revised Statutes of 1877, which were not revisited until just before the turn of the century when a much more ambitious project to codify, organize, and expand federal criminal laws was authorized by Congress. *See* Act of June 4, 1897, 30 Stat. 58; John L. McClellan, *Codification, Reform, and Revision: The Challenge of a Modern Federal Criminal Code*, 1971 DUKE L.J. 663, 677-69. Congress subsequently passed the Criminal Code of 1909. *See* Act of March 4, 1909, ch. 321, 35 Stat. 1088; McClellan, supra, at 677-79. In 1926, Congress passed the first edition of the United States Code, consisting of 50 titles. Given the scope of the legislation, it was necessary to passage in both houses of Congress for the inclusion of a "savings clause" which made the U.S. Code "merely prima facie evidence of the statement of the law." In 1942, the Committee on Revision of the Laws decided to seek to a permanent and definitive status for the United States Code, and resolved to propose revisions and enactment on a title-by-title basis in an effort to facilitate passage in both houses. The consideration of H.R. 1600 was part of this effort. *See* Title 18 Hearing Report, at 6.

criminological research and deliberation spurred many states to undertake significant revisions of their criminal codes.[14]

In 1965, President Lyndon Johnson's Commission on Law Enforcement and the Administration of Justice ("Johnson Crime Commission") began a comprehensive review of American criminal justice.[15] The Johnson Crime Commission report, issued in 1967, "spanned twelve substantive chapters covering a snapshot of crime in America, juvenile delinquency and youth crime, police, courts, corrections, organized crime, narcotics and drug abuse, drunkenness, control of firearms, science and technology, research, and a national strategy on crime."[16] Among the concerns arising from the work of the Johnson Crime Commission was the issue of "overcriminalization," particularly as it pertained to the expansion in the number of criminal statutes.[17]

In 1966, just after the Johnson Crime Commission had begun its work, Congress established the National Commission on the Reform of Federal Criminal Laws, which was chaired by Edmund Brown, Sr., a former governor of California.[18] Among those serving on what was commonly referred to as the "Brown Commission" were six members of the United States House of Representatives, three United States Senators, and four federal judges.[19] The Advisory Committee, which was chaired by recently-retired Associate Justice Tom C. Clark, included the likes of Patricia Roberts Harris, Louis Pollak, Cecil Poole, Elliot Richardson, and James Vorenberg.[20] The work of the Brown Commission was led by a staff and corps of

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[14] *See* Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 91-92 (1998); *see also* Roger A. Fairfax, Jr., *From "Overcriminalization" to "Smart on Crime": American Criminal Justice Reform—Legacy and Prospects*, 7 J. L., ECON. & POLICY 597, 603 (2011).

[15] Fairfax, *supra* note 14, at 604.

[16] Fairfax, *supra* note 14, at 605 (citing PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY, A REPORT 17-291 (1967) [hereinafter THE CHALLENGE OF CRIME IN A FREE SOCIETY].

[17] Fairfax, *supra* note 14, at 606 (citing Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967)).

[18] *See* Pub. L. No. 89-801, 80 Stat. 1516 (1966).

[19] *See* NAT'L COMM'N ON REFORM OF FED. CRIM. LAWS, FINAL REPORT: A PROPOSED NEW FEDERAL CRIMINAL CODE (TITLE 18, UNITED STATES CODE) v (1971) [hereinafter BROWN COMMISSION REPORT].

[20] *See* BROWN COMMISSION REPORT vi.

consultants directed by Professor Louis Schwartz, a co-reporter for the American Law Institute's Model Penal Code project, and Richard Green, the director of the American Bar Association's Criminal Justice Standards project.[21]

Although the Brown Commission began with the broader mandate to review "substantive criminal law and the sentencing system" as well as "procedure and all other aspects of 'the federal system of criminal justice,'" the decision was made to narrow the Commission's focus to substantive federal criminal law.[22] The Foreword to the Commission's Final Report describes the process the Commission undertook to produce the proposed new Title 18 of the United States Code:

> The Commission's staff and consultants, working with law enforcement agencies, prepared preliminary drafts and supporting memoranda. These drew upon the reports of other bodies, such as the President's Commission on Law Enforcement and the Administration of Justice, the National Commission on Causes and Prevention of Violence, the National Advisory Commission on Civil Disorders, the American Bar Association Project on Standards for Criminal Justice, the American Law Institute, the National Council on Crime and Delinquency and numerous state penal law revision commissions.[23]

After review of these preliminary materials by Advisory Committee and Commission members, the Commission produced a Study Draft in June of 1970. This Study Draft was disseminated widely – "to all federal agencies, members of Congress, staff of the pertinent Congressional committees, federal judges, state attorneys general, chief justices, metropolitan district attorneys and numerous law schools, law professors, bar and professional associations, research bodies and private attorneys."[24] The Commission received substantial feedback on the Study Draft from government agencies, the U.S. Judicial Conference, prosecutors, and private attorneys, and was able to incorporate that feedback into its revision.[25]

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[21] *See id.* at vii; Gainer, *supra* note 14, at 97.

[22] *See* BROWN COMMISSION REPORT xi.

[23] *Id.* at xi.

[24] *Id.* at xii n.2.

[25] *See id.* at xii.

The Final Report of the Brown Commission was transmitted to the President and Congress on January 7, 1971.[26] The Commission's proposed new Title 18 was a comprehensive collection of all federal felony offenses. The proposed Code "codifie[d] common [common law] defenses" and "establishe[d] standard principles of criminal liability and standard meanings for terms employed in the definitions of offenses and defenses."[27] The proposed Title 18 also set out clear standards and bases for the exercise of federal jurisdiction over criminal conduct, separated from the core elements of defined offenses.[28] Perhaps the most striking improvement of the proposed Code was that it was an "integrated system,"[29] adopting: a general part setting out the aforementioned definitions, principles for liability, and bases for the exercise of federal jurisdiction (Part A); a special part defining all federal offenses (Part B); and a part outlining a sentencing system (Part C).

Despite the Brown Commission's Herculean efforts, the proposed comprehensive federal criminal code never was enacted into law. Over a period of almost twelve years after the Brown Commission, the adoption of a comprehensive federal criminal code "was a major focus of the Senate Judiciary Committee, was twice before the full Senate for consideration, and was the subject of a shorter but intense period of drafting and debate within the House Judiciary Committee."[30] However, for various reasons, the legislative efforts in both houses were unsuccessful.[31]

Is it Time to Try Again on Federal Criminal Code Reform?

It may be time to revisit federal criminal code reform. However, one must ask whether another attempt at comprehensive federal criminal code reform would be quixotic? After all,

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[26] *See id.* at i.

[27] *Id.* at xii.

[28] *See id.* at xii; *see also id.* at 11-26 (proposed Chapter 2, "Federal Penal Jurisdiction," §§ 201-219).

[29] *Id.* at xiii.

[30] *See* Gainer, *supra* note 14, at 111; *see also id.* at 111-129 (cataloguing the various federal criminal code reform bills and hearings in the House and Senate between 1971 and 1982).

[31] *See* Joost, *Federal Criminal Code Reform*, *supra* note 3, at 203-209. One commentator close to the process has attributed the legislative failure, in part, to intense public criticism sometimes borne of misinformation about the implications of the proposed code for federal jurisdiction, civil liberties, and public morals. *See* Gainer, *supra* note 14, at 129-135.

very capable men and women with unmatched intellect and dedication were unsuccessful in their efforts forty years ago. Nevertheless, I believe that, by taking lessons from the past and building upon the work of the Brown Commission, we have an opportunity for meaningful reform.[32]

To be sure, many of the challenges that faced Congress after the Brown Commission remain with us. There are the same structural and institutional capacity constraints that make it difficult to pass such a sweeping revision of federal criminal law in the lifespan of any one Congress. As in the 1970s and 1980s, the passage of a comprehensive federal crime code revision would require close cooperation and, in some circumstances, near-synchronization among the leadership and relevant committees of both houses of Congress.[33]

Furthermore, as in the past, there would need to be a substantial degree of consensus among the Congress, the Administration, and the relevant stakeholders in the bench and bar as to the means and the ends of comprehensive federal criminal code reform.[34] Finally, as was the case forty years ago, this unity of mind would need to be accompanied by the political will to make the case to the general public that not only is federal criminal code reform a worthwhile endeavor and respectful of our cherished traditions, but that the short-term inconvenience of transitioning to a new Code would be justified by the long-term improvements to the law and the administration of criminal justice.[35]

However, there are some significant differences between the post-Brown Commission era and today. Whatever criticisms have been leveled at the partisan nature of our politics today,[36] crime policy recently has emerged as a welcome exception. A strong, bipartisan consensus has been developing around the idea that while we should be tough on crime, we should also be *smart* on crime.[37] As I have written, "[f]or the first time in more than a generation, political

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[32] *See* Joost, *Federal Criminal Code Reform*, *supra* note 3, at 213.

[33] *See* Gainer, *supra* note 14, at 147-150.

[34] *See id.* at 141-151.

[35] *See id.* at 140-141. Federal criminal code reform would not be without its costs, including the transition period during which the legal system with need to grapple with questions related to jury instructions, interpretive appellate precedent, and settled expectations of judges, prosecutors, and defense attorneys who work with the current federal criminal code. *See* Gainer, *supra* note 14, at 157 n.198; Joost, *Federal Criminal Code Reform*, *supra* note 3, at 218-219; Brickey, *supra* note 9, at 176-177.

[36] *See, e.g.*, Brickey, *supra* note 9, at 188-189.

[37] *See* Roger A. Fairfax, Jr., *The "Smart on Crime" Prosecutor*, 25 GEO. J. L. ETHICS 905, 907-908 (2012).

leaders have shown a willingness to move away from the 'soft-on-crime' and 'tough-on-crime' binary and take a hard look at whether we are receiving a proper return on the tremendous societal investment in our criminal justice policies."[38] Given the current receptivity to innovation in criminal justice policy, the time may be ripe for reconsideration of federal criminal code reform.

Potential Solutions

Below are a number of suggestions for consideration if the Congress contemplates embarking on an effort to reform the federal criminal code. I cannot claim to have originated these ideas, many of which are borrowed from those who have been involved in this work for decades – people such as Ronald Gainer, Professor Paul Robinson, Robert Joost, and the late Professor Kathleen Brickey. However, I do find them compelling and wish to offer them to you this morning as part of a broader plan to achieve criminal code reform.

Establishment of a New Commission to Reform the Federal Criminal Code

Based on the experience with federal criminal code reform in the 1960s and 1970s, I believe that a code reform commission can be a valuable asset. Although I do not necessarily believe that a commission is indispensible (as I explain below), it does provide the opportunity for broad participation of stakeholders at an early stage in drafting. Some observers of the Brown Commission have asserted that the engagement (and buy-in) of the various constituents in the legislative and executive branches as well as in the bar and practice community is essential to achieving federal code reform.[39]

A Commission would also provide legislators consistent access to technical expertise and the focused engagement of staff and consultants during the drafting period. Although the relevant committees in the House and Senate have very able and committed staff, these staffers have other duties and the Members for whom they work have other priorities to which they must attend. A Commission staff would be in a position to devote full attention to the task of working with the Commission and stakeholders to draft a proposed federal criminal code.

With regard to the makeup of a modern-day federal criminal code commission, there is no need to reinvent the wheel. Although it may be helpful to look to the experiences of states

[38] Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316, 2319-2320 (2013).

[39] *See, e.g.*, Joost, *Federal Criminal Code Reform*, *supra* note 3, at 213, 217.

that have successfully engaged in code reform,[40] the structure and balance of representation on the Brown Commission would still be largely appropriate today. However, I do believe that it is essential to include among the Commissioners and Advisory Committee membership greater representation from the career and political ranks of the Department of Justice. Again, such early engagement among key stakeholders – such as House and Senate leadership, the Administration and the Department of Justice, and the practice community – increases the chances that a singular bill could emerge as the vehicle for federal criminal code reform.[41]

Another aspect of a Commission's work that could help to achieve legislative success for its recommendations would be a strict focus on policy-neutral revisions to the federal criminal code.[42] The Commission could determine that such neutrality was possible in a sweeping, comprehensive revision, or it might conclude instead that it should focus on the low-hanging fruit, severing any controversial revisions for later deliberation. However, to the extent that matters of controversy must be taken up in the process of revising the federal criminal code, it is preferable to have them debated and potentially resolved during Commission deliberations than for the first time in the subsequent legislative debate.[43]

Partnership with Non-Partisan Law Reform Groups

An alternative to a criminal code revision commission might be a partnership with a capable and respected non-partisan law reform entity. Such an entity could provide technical and drafting assistance, and could help with the research of difficult legal issues confronting the drafters of the revised criminal code. I would reiterate a suggestion made by former Attorney General Richard Thornburgh when he testified before Chairman Sensenbrenner's Subcommittee

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[40] *See, e.g.,* Robinson, *supra* note 7, at 225; Joost, *Federal Criminal Code Reform*, *supra* note 3, at 206-208.

[41] *See* Joost, *Federal Criminal Code Reform*, *supra* note 3, at 222-223.

[42] *See* Gainer, *supra* note 14, at 156; Joost, *Federal Criminal Code Reform*, *supra* note 3, at 206, 208; *but see* Brickey, *supra* note 9, at 179-184 (questioning whether policy neutrality in criminal code reform is achievable).

[43] Other suggestions for facilitating legislative success on federal criminal code reform include the maintenance of the Commission throughout the pendency of the legislative process so that it might provide drafting or technical support to the Congress, *see* Joost, *Federal Criminal Code Reform*, *supra* note 3, at 220; Gainer, *supra* note 14, at 154-155 n. 197, the adoption of "fast-track" rules to enhance the chances of having a bill debated and passed within the span of one Congress, *see* Joost, *Federal Criminal Code Reform*, *supra* note 3, at 221, and agreements limiting amendments. *See* Gainer, *supra* note 14, at 155.

on Crime, Terrorism, and Homeland Security in December 2011.[44] General Thornburgh joined others who have suggested that perhaps the American Law Institute would be an appropriate partner to the Congress in pursuing the sort of ambitious criminal code reform that might be contemplated.[45] The ALI's experience with the Model Penal Code and its influence on the criminal code revision efforts of many states makes the ALI an ideal confederate in a federal criminal code revision effort. Although I am a member of the ALI, I am not on the governing Council and do not purport to speak for the Institute, but it certainly may be worth exploring this idea with them or some other potential partner, such as the Criminal Justice Section of the American Bar Association, which has long been a leader in criminal law reform efforts.

Permanent Criminal Law Revision Commission

Regardless of the vehicle used to revise and modernize the federal criminal code, Congress might consider establishing a dedicated, non-partisan, and professionally-staffed "criminal law revision commission" charged with assisting in the analysis and drafting of all proposed new criminal laws.[46] Such a commission could function like the Congressional Budget Office, providing impact assessments of proposed criminal laws and penalties, evaluating the need for new laws and noting potential redundancies, assisting with the technical drafting of the mens rea and other elements of the proposed laws, and identifying where the new criminal statutes best fit within the framework and organization of the larger criminal code. This sort of guidance could help to avoid what happened following earlier attempts at federal criminal code reform when decades of piecemeal criminal legislation essentially reverted the Title 18 to its pre-revision state.[47]

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[44] *See* Criminal Code Modernization and Simplification Act of 2011, Hearing on H.R. 1823 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on Judiciary, 112th Cong. (2012), at 76-77.

[45] *See id.*; Gainer, *supra* note 14, at 153-154 (suggesting the involvement of laws schools and the American Law Institute).

[46] *See* Gainer, *supra* note 14, at 158; Joost, *Federal Criminal Code Reform*, *supra* note 3, at 213.

[47] A variation on this idea is the requirement of "sequential referral," whereby the Judiciary Committees of Congress would have joint jurisdiction over any legislation imposing a criminal penalty. *See* BRIAN W. WALSH & TIFFANY M. JOSLYN, HERITAGE FOUND., WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 28-30 (2010).

Conclusion

As I conclude, I would be remiss if I did not acknowledge how federal criminal code reform relates to the other opportunities for progress in criminal justice reform. I understand that the agenda of this Task Force includes an examination of our nation's sentencing policies – policies that have contributed to an incarceration explosion, with over 2 million currently behind bars.

I know that Representative Labrador and Ranking Member Scott and some of the other members of the Task Force have worked across the aisle and with on the Smarter Sentencing Act of 2013,[48] which is a companion to the bi-partisan Smarter Sentencing Act of 2013 in the Senate.[49] The chair of of the U.S. Sentencing Commission has been supportive of this and other bi-partisan sentencing reform legislation being considered.[50]

The executive branch has also been working on new approaches to criminal justice policy, with the Department of Justice recently making policy pronouncements regarding reforms relating to ex-offender re-entry and mandatory minimum sentences.[51] Indeed, earlier this month, I attended a criminal justice reform roundtable at which Attorney General Eric Holder shared the stage with Ranking Member Scott, Senator Rand Paul, Senator Mike Lee, and Senator Sheldon Whitehouse, all of whom are co-sponsors of the Smarter Sentencing Act legislation in either the House or Senate.[52] Although these public servants fall at different places along the political spectrum, they all spoke with one voice on the need for criminal justice reform and the opportunities before us.

Also, as we sit here, many states – with governors and legislative majorities of both political parties – are implementing bipartisan, evidence-based criminal justice reforms and are beginning to reap the benefits in the form of lower incarceration and recidivism rates and savings

[48] *See* Smarter Sentencing Act of 2013, H.R. 3382, 113th Cong. (2013).

[49] *See* Smarter Sentencing Act of 2013, S. 1410, 113th Cong. (2013).

[50] *See* Statement of Judge Patti B. Saris, Chair, United States Sentencing Commission, For the Hearing on "Reevaluating the Effectiveness of Federal Mandatory Minimums" Before the Committee on the Judiciary, United States Senate, September 18, 2013.

[51] *See* Remarks of Attorney General Eric Holder, Annual Meeting of the American Bar Association House of Delegates, August 12, 2013.

[52] *See* Mary Crowley, *AG Holder Makes News at Vera-Leadership Conference Event on Bipartisan Criminal Justice Reform*, Vera Inst. Of Justice, (Feb. 14, 2014), http://www.vera.org/blog.

of taxpayer resources for other important societal investments such as education and infrastructure in what is a difficult budgetary environment in many jurisdictions.[53]

In addition to the bipartisan cooperation taking place in government, private entities from across the political spectrum – groups like Heritage, Cato, Justice Fellowship, ALEC, Right on Crime, ACLU, NAACP, Sentencing Project, NAACP Legal Defense and Educational Fund, NACDL, Leadership Conference on Human and Civil Rights, and Justice Roundtable – have been working hand-in-hand on criminal justice reform.[54] Furthermore, many non-partisan bar and law reform entities such as the American Bar Association and the American Law Institute, and religious communities have made criminal justice reform a priority.

These criminal justice reform efforts have benefited from research, technical assistance, and data collection and analysis from think tanks and research centers such as Vera Institute for Justice, the Joint Center for Political and Economic Studies, the Charles Hamilton Houston Institute, the Brennan Center, Pew Charitable Trusts, and the Urban Institute.

Ultimately, data-driven, evidence-based policies that help make our communities safer, reduce crime and recidivism, promote justice and fairness, and save taxpayer dollars represent a win-win-win. Such policies represent not a Republican victory or a Democratic victory, but an American victory.

There are those who say it cannot be done; that the politics of crime are much too divisive to permit bi-partisan cooperation on meaningful criminal justice reform. Those naysayers are wrong. It can be done. The Fair Sentencing Act of 2010 is but one example; this very Task Force assembled here this morning is another.

I firmly believe that we are in the midst of a special moment in criminal justice reform. The work of this Task Force on federal criminal code reform and the other issues on its agenda will help to ensure this historic opportunity is not lost.

So, again, thank you all for your leadership and attention, and thank you again Mr. Chairman for the invitation to speak with the Task Force this morning.

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[53] *See, e.g.*, AMERICAN CIVIL LIBERTIES UNION, SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES (2011).

[54] *See, e.g.*, Laura W. Murphy (ACLU) & Grover Norquist (Americans for Tax Reform), *Congress Must Act to Finish Job on Criminal Justice Reform* (August 20, 2013), http://www.aclu.org/blog (joint statement urging passage of bi-partisan Smarter Sentencing Act and Justice Safety Valve Act of 2013, H.R. 1695 and S. 619).

Mr. SENSENBRENNER. Thank you, Mr. Fairfax.
Mr. Cline?

TESTIMONY OF JOHN D. CLINE, ESQUIRE,
LAW OFFICE OF JOHN D. CLINE

Mr. CLINE. Mr. Chairman, Ranking Member Scott, and Members of the Task Force, thank you for the opportunity to share my views as a criminal defense lawyer.

A comprehensive revision of the Federal criminal code should focus on five main points: reducing the number of Federal crimes, ensuring that the revised code strikes a proper balance between Federal and State law enforcement, clearly defining the appropriate levels of mens rea, establishing uniform rules of construction, and revising the overly harsh punishment system. I will take those in turn.

First, reducing the number of Federal offenses. The list of Federal crimes has grown from a handful in the Crimes Act of 1790 to thousands today. This growth has occurred in part because the country has become more complex, but it also occurs because every time there is a national crisis, the reaction is to enact new Federal crimes. The result is a morass of overlapping statutes.

For example, there are more than two dozen different false statements statutes in Chapter 47 of Title 18. There are seven different fraud statutes in Chapter 63 of Title 18. And I count 19 different obstruction offenses in Chapter 73 of Title 18.

This proliferation of Federal offenses has two main practical consequences, from my perspective. First of all, the sheer number of crimes creates a notice problem. Justice Holmes declared that "fair warning should be given to the world, in language that the common world will understand," talking about notice of crimes. But with the statutory scheme that now exists, fair warning is a fiction.

Second, the existence of multiple Federal statutes that address the same conduct encourages Federal prosecutors to overcharge. Some prosecutors take advantage of overlapping offenses to charge the same course of conduct in multiple counts under multiple statutes. The result is often juror compromise. Jurors who can not agree unanimously on guilt or innocence decide to split the baby, to convict on some and to acquit on others, thinking that they are giving the defendant a break by doing that. But they can not be told, but the truth is, that a conviction on one count in Federal court is typically as bad as a conviction on all counts.

So reducing the number of Federal crimes will reduce overcharging. It will reduce juror compromise. And it will help ensure fairness to defendants.

Revising the Federal criminal code affords the opportunity to address other troublesome areas as well. I will just touch briefly on one of those, which is conspiracy.

Justice Jackson warned about the elastic, sprawling, and pervasive conspiracy offense. The offense of conspiracy to defraud the United States is especially amorphous. A revision of the code affords an opportunity to think carefully about conspiracy, and to focus more clearly on who truly deserves to be caught up in its net.

The second principle is restoring the Federal and State ballots. Our Federalist system initially contemplated that the States would

have the primary role in law enforcement. Over the last 50 years, however, Federal criminal jurisdiction has exploded to the point that almost any culpable conduct can be brought within the Federal ambit.

As a result, just to cite some examples from my own practice, we see vote buying in local elections charged us Federal RICO offenses. We see nondisclosure under State campaign finance laws charged as mail fraud or wire fraud. And we see violation of local anti-patronage laws being charged as Federal honest services fraud. And of course, there are drug laws where the gap between Federal enforcement and State enforcement seems to grow.

Reforming mens rea, I will just touch on one area there, which is willful blindness. There is a Federal doctrine of willful blindness, which is a judge-made notion that allows the awareness of a high probability of a fact, and a deliberate effort to avoid knowledge, to substitute for actual knowledge, which is the element that Congress has provided. That is a dangerous provision for defendants, because it weakens the mens rea requirement, which is often the only element that is disputed in a Federal criminal case. Revising the Federal criminal code affords an opportunity to take a look at willful blindness and make a reasoned decision as to whether it should be used or not.

The fourth area is uniform rules of construction. I will touch on one, the rule of lenity. Now it is applied in sort of a haphazard, ad hoc way by courts. A revision of the Federal criminal code affords an opportunity to make that a uniform rule of construction, so that doubts about the meaning of a Federal criminal statute are uniformly resolved in favor of the defendant. That is important to fair notice. It is important to fairness, generally.

And finally, revision of the code affords an opportunity to fix some of the harsh punishment provisions now, especially mandatory minimums, that have resulted in an enormous and unnecessarily large Federal prison population.

Thank you very much.

[The prepared statement of Mr. Cline follows:]

Written Statement of

John D. Cline, Esquire

Law Office of John D. Cline, San Francisco, CA

Before the

House Committee on the Judiciary

Over-Criminalization Task Force

Re: Reform of the Federal Criminal Code

February 28, 2014

Thank you for the opportunity to share my views on reforming the federal criminal code. I bring you the perspective of a lawyer who has practiced criminal defense in the federal courts for more than twenty-seven years. I have tried criminal cases in federal district courts nationwide. I have argued appeals in many of the federal circuits and, on one memorable occasion, in the United States Supreme Court. From this vantage point, I have observed the practical effect of our bloated federal criminal code.

Congress has revised the federal criminal code a handful of times over the last century and a half, most recently in 1948. It is past time for another comprehensive revision. In my view, that effort should focus on five main points: (1) reducing the number of federal crimes; (2) ensuring that the revised federal criminal code strikes a proper balance between federal and state criminal enforcement; (3) clearly defining the different levels of mens rea and applying those definitions in a fair and rational way to federal offenses; (4) establishing uniform rules of construction; and (5) revising the overly harsh punishment system that has produced an excessive federal prison population.

I. REDUCING THE NUMBER OF FEDERAL CRIMES.

The list of federal criminal crimes has grown from a handful in the Crimes Act of 1790 to thousands today--how many thousands, no one is

quite sure. This growth has occurred in part because the country has become more technologically sophisticated, more complex, and more interconnected--and thus the need for offenses that can address crime that occurs in multiple states and even overseas has expanded. But the number of federal crimes has also increased because every national crisis seems to breed new federal crimes to address the problem. This has often occurred, regrettably, without sufficient inquiry into whether a criminal sanction is necessary at all--as opposed to civil and administrative remedies--and, if so, whether existing federal criminal statutes, many of which are broadly worded, suffice to punish the conduct at issue. This process functions like a ratchet, going only one way: statutes are regularly added to the federal criminal code, but they are almost never removed.

The result of the urge to enact federal criminal legislation in response to each new crisis is a morass of often overlapping statutes. For example, there are more than two dozen different false statement statutes in Chapter 47 of Title 18; there are seven different fraud statutes in Chapter 63 of Title 18; and I count nineteen different obstruction offenses in Chapter 73 of Title 18. Of course, these are just some of the federal offenses addressing these topics; there are other false statement, fraud, and obstruction offenses

scattered here and there throughout Title 18 and still more in other Titles of the federal code.

Federal offenses lurk as well in regulations promulgated by various agencies. These regulatory crimes are especially pernicious because they rarely, if ever, receive careful scrutiny from Congress. They represent a dangerous confluence of power: the Executive Branch that prosecutes crimes also creates and defines them.

This proliferation of federal offenses has two main practical consequences, from my perspective as a defense lawyer. First, the sheer number of crimes creates a notice problem. Justice Holmes declared long ago that "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed."[1] But with the statutory scheme that now exists, "fair warning" is a fiction. Not even the most sophisticated and experienced criminal practitioner can say, without extensive research, whether certain courses of conduct violate federal law; pity the nonlawyer who must make that determination. If we are to presume that everyone knows the law--a maxim courts repeat with some regularity--it behooves us to make the law knowable.

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[1] *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

Second, the existence of multiple federal statutes that address the same conduct encourages federal prosecutors to overcharge. The Antitrust Division, to its credit, typically brings a one-count indictment in criminal price-fixing cases, charging a violation of the Sherman Act. That commendable practice gives the jury a clear choice: guilty or not guilty.

By contrast, many federal prosecutors take advantage of overlapping federal criminal offenses to charge the same course of conduct under two, or three, or more different statutes or regulations. Instead of a one-count indictment charged under a single statute, the jury might have ten or twenty or a hundred counts charged under several different statutes. The result is often jury compromise. Jurors cannot agree unanimously whether the defendant is guilty, so, as a compromise, they convict on some counts and acquit on others.

What jurors are not told--and cannot be told in the federal system--is that for sentencing purposes a conviction on even one count is often the same as conviction on all counts.[2] When jurors compromise, they likely think they are giving each side a partial victory. But they are wrong; in practical terms, a guilty verdict on even one of a hundred counts is the same

[2] This is largely, although not exclusively, a result of the relevant conduct rules under the federal sentencing guidelines. *See, e.g.*, U.S.S.G. § 1B1.3.

as a guilty verdict on all counts.[3] Prosecutors know this and some take advantage of it--unfairly, in my view--by overcharging. Pruning the federal criminal code will reduce this practice and help to ensure fairness for defendants.

The process of reducing and making rational the federal criminal code affords the opportunity to address other troublesome areas, beyond the sheer number of federal offenses. Let me mention two such areas, among many. First, the law of conspiracy is long overdue for careful examination. As it stands now, the federal criminal code has a number of conspiracy provisions. Some require an overt act, as well as a criminal agreement.[4] Others do not.[5] None of the conspiracy statutes clearly defines the mens rea necessary for conviction. The offense of conspiracy to defraud the United States is particularly amorphous; that statute has been interpreted to encompass

[3] To cite a recent example, when a New York jury acquitted Mohamed Ghailani on 284 out of 285 counts, many--possibly including the jurors--viewed the outcome as a victory for the defense and a repudiation of the prosecution case. But Ghailani received a life sentence on the single count of conviction--the same sentence, in practical terms, he would have received had he been convicted on all counts.

[4] *E.g.*, 18 U.S.C. § 371.

[5] *E.g.*, 18 U.S.C. § 1956(h); *Whitfield v. United States*, 543 U.S. 209 (2005).

almost any effort to interfere with a function of the federal government through deceit.[6]

Justice Jackson warned many years ago about the "elastic, sprawling, and pervasive" conspiracy offense, which he described as "so vague that it almost defies definition."[7] A revision of the federal code affords an opportunity to rethink conspiracy and ensure that only those truly deserving of criminal punishment are swept up in its net.

As part of the reconsideration of conspiracy law, it is worth examining the so-called *Pinkerton* rule. In *Pinkerton v. United States*,[8] the Supreme Court held that a conspirator is criminally liable for the foreseeable substantive crimes of his co-conspirators in furtherance of the conspiracy, even if the conspirator himself played no part in the substantive offense and did not intend that it occur. *Pinkerton* thus expands the already vast sweep of conspiracy to include substantive offenses as well. The case stands alone in the federal system as a common-law, judge-made theory of criminal liability. If such a basis for conviction is to exist--and I do not think it

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[6] *See, e.g., United States v. Coplan*, 703 F.3d 46, 59-62 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 71 (2013); Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405 (1959).

[7] *Krulewitch v. United States*, 336 U.S. 440, 446 (1949) (Jackson, J., concurring).

[8] 328 U.S. 640 (1946).

should--it ought to be based on a careful legislative judgment and not on the decree of federal judges.

Second, the principal statute used to prosecute improper disclosures of classified information--18 U.S.C. § 793--has been criticized for decades because of its convoluted language and uncertain scope.[9] That statute has gained heightened prominence of late, with the prosecution of alleged leakers undertaken by the current Department of Justice. Recent judicial decisions have underscored the uncertainty surrounding the mens rea necessary for conviction and the scope of the key phrase "information relating to the national defense."[10] Here too a revision of the federal criminal code affords an opportunity to fix a long-festering problem.

There are many other such troublesome parts of the federal criminal code--the two I have mentioned are merely illustrative. A comprehensive reform of the code affords an opportunity to think through these problems and resolve them in a rational, systematic, and fair way.

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[9] *See, e.g., United States v. Morison*, 844 F.2d 1057, 1085-86 (4th Cir. 1988) (Phillips, J., concurring); *United States v. Rosen*, 445 F.2d 602, 613 & n.7 (E.D. Va. 2006); Harold Edgar and Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929, 998 (1973).

[10] *E.g., United States v. Kim*, Case No. 1:10-cr-225-CKK, Memorandum Opinion (Docket No. 137) at 6-12 (D.D.C. July 24, 2013).

II. RESTORING THE FEDERAL-STATE BALANCE.

Reform of the code affords another, closely related opportunity: To restore the balance between federal and state law enforcement.

Our federalist system initially contemplated that law enforcement would be primarily a state function. There were only a few federal offenses, and those offenses focused on the protection of clearly federal interests. Although the Supreme Court has recognized the need to exercise caution in altering this traditional federal-state balance in law enforcement,[11] federal criminal jurisdiction has expanded so voraciously that now almost any culpable conduct can be brought within the federal ambit, through a wiring, a mailing, or a potential effect on interstate commerce.[12]

As a result, we see--to cite examples from my own practice--vote-buying in local elections, punishable under state law with a short prison term, being charged as a federal RICO violation, with a potentially massive prison term and forfeiture. We see nondisclosure under state campaign finance laws, punishable as misdemeanor offenses or through civil penalties,

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[11] *See, e.g., Cleveland v. United States*, 531 U.S. 12, 24-25 (2000); *United States v. Bass*, 404 U.S. 336, 349-50 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971).

[12] In a handful of cases, the Supreme Court and the courts of appeals have attempted to place limits on the vast sweep of federal criminal power. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *Waucaush v. United States*, 380 F.3d 251, 256-57 (6th Cir. 2004). But these cases mark only brief interludes in the steady expansion of federal criminal jurisdiction. *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 23-33 (2005) (reading *Morrison* and *Lopez* narrowly).

being charged as a federal wire or mail fraud offense, felonies that carry a loss of civil rights, in addition to draconian punishment. And we see violation of state and local anti-patronage laws, with relatively modest potential punishments, being charged as federal honest services fraud, again with a lengthy prison term, stiff financial penalties, and the disabilities of a federal conviction. And of course there are drug laws, where the gap between state and federal law enforcement grows steadily wider.

Some may argue--though I would disagree--that federal interests justify treating these essentially local matters as federal crimes. Regardless of where Congress ultimately strikes the federal-state balance in law enforcement, the issue deserves careful, systematic consideration. Reform of the federal criminal code affords that opportunity.

III. REFORMING MENS REA.

I know that the Task Force has heard a great deal about the need to reform the federal mens rea standards. Please let me add my voice to those who urge thoughtful change in this area. A comprehensive reform of the federal criminal code affords an ideal opportunity to establish uniform

terminology for different levels of mens rea and to assign to each offense in the revised federal criminal code an appropriate level of mens rea.[13]

This is not the hearing for a comprehensive critique of the current mens rea morass. But I would like to address two issues, among many, worthy of attention as part of a reform of the federal criminal code.

First, it is important to determine when the government must prove that the defendant knew his conduct was illegal, and with what degree of specificity. Federal courts routinely recite the old maxim that ignorance of the law is no excuse, and no federal criminal statute of which I am aware expressly requires proof that the defendant knew his conduct was illegal. But given the extraordinary complexity of federal crimes and the constitutional imperative of fair notice, courts have interpreted the mens rea element of certain federal offenses to require knowledge of illegality. These cases do not typically require proof that the defendant knew the precise statute he was violating, or even that his conduct violated a criminal statute--but they do require proof that he knew what he was doing was unlawful.[14]

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[13] Sections 2.02 through 2.05 of the Model Penal Code represent an effort to establish and define a hierarchy of mens rea requirements. The MPC mens rea provisions may work well for a typical state criminal code, but they are inadequate for the more complex offenses that appear in the federal code. Among other deficiencies, the MPC does not adequately address the need for proof of knowledge of illegality in the context of broadly worded federal offenses.

[14] *See, e.g., Bryan v. United States*, 524 U.S. 184, 196 (1998); *United States v. Bishop*, 740 F.3d 927, 2014 U.S. App. LEXIS 1697, at *13-*19 (4th Cir. Jan. 28, 2014).

Courts generally find the requirement of knowledge of illegality in the statutory term "willfully."[15] But, as the Supreme Court has observed, "willfully" is a word of many meanings, ranging from mere intentional conduct to an intentional violation of a known legal duty.[16] Because "willfully" has no clear definition, and because there is rarely legislative history illuminating its meaning in specific statutes, courts are left to decide for themselves what the term means in any given context.

This comes close to the common-law crime creation that the Supreme Court long ago forbade,[17] and it creates serious notice problems as well. Reform of the federal criminal code affords the opportunity to decide, in a reasoned and systematic way, when knowledge of illegality should be required and how specific that knowledge must be.

A second area that deserves comprehensive reform is the judge-created doctrine of willful blindness--also known as deliberate ignorance or conscious avoidance. According to this doctrine, when Congress requires the government to prove that the defendant acted with knowledge of a particular fact, the government can satisfy that burden by showing that,

[15] *E.g., Ratzlaf v. United States*, 510 U.S. 135, 143-49 (1994); *Cheek v. United States*, 498 U.S. 192, 198-99 (1991).

[16] *E.g., Ratzlaf v. United States*, 510 U.S. 135, 141 (1994); *Spies v. United States*, 317 U.S. 492, 497 (1943).

[17] *See United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816); *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

although the defendant did not have the required knowledge, he was aware of a high probability that the fact existed and took deliberate actions to avoid learning the truth.[18]

This judicially-created substitute for knowledge was originally used in drug cases--where, for example, mules caught driving cars with drugs hidden in secret compartments would deny knowing that the drugs were there.[19] Courts insisted that the doctrine was to be rarely used.[20] But as the years passed the courts threw caution to the wind.[21] Now federal district courts routinely give a willful blindness instruction in almost any case where the defendant does not expressly concede knowledge, and courts even let the government argue actual knowledge and willful blindness in the alternative.[22]

The widespread use of willful blindness instructions creates grave danger for defendants. In many--perhaps most--federal criminal cases, mens rea is the only element that is seriously disputed. Any instruction that waters

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[18] *E.g., Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070 (2011).

[19] *See, e.g., United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (en banc).

[20] *E.g., United States v. Hilliard*, 31 F.3d 1509, 1514 (10th Cir. 1994); *United States v. Ojebode*, 957 F.2d 1218, 1229 (5th Cir. 1992).

[21] *E.g., United States v. Heredia*, 483 F.3d 913, 924 n.16 (9th Cir. 2007) (en banc) (overruling prior decisions stating that the willful blindness instruction is "rarely appropriate" and "should be used sparingly").

[22] *See, e.g., United States v. Carlo*, 507 F.3d 799, 802 (2d Cir. 2007).

down the required mens rea has the inevitable effect of tilting the playing field in the prosecution's favor. Willful blindness instructions are especially pernicious because, despite cautionary language, they may cause lay jurors to blur the line between negligence or recklessness, which typically are not criminal, and knowledge, which can be.[23]

The decision to permit conviction based on something less than actual knowledge is a quintessentially legislative one; in our federal system, where common law crimes are anathema, that decision should not be made by judges. Congress has on occasion chosen to include willful blindness provisions in criminal statutes--in the Foreign Corrupt Practices Act, for example.[24] But the question of when, if ever, a conviction can rest on a deliberate lack of knowledge, rather than on knowledge itself, should be resolved comprehensively and systematically as part of an overall reform effort.

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[23] *E.g., United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990) (Posner, J.). *See generally* Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. Crim. L. & Criminology 191 (1990) (discussing legal and philosophical flaws in use of conscious avoidance as a substitute for actual knowledge); *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2072-73 (2011) (Kennedy, J., dissenting) (criticizing conscious avoidance doctrine); *United States v. Heredia*, 483 F.3d 913, 930-33 (9th Cir. 2007) (en banc) (Graber, J., dissenting) (same).

[24] 15 U.S.C. § 78dd-2(h)(3)(B).

IV. ESTABLISHING UNIFORM RULES OF CONSTRUCTION.

Courts have adopted certain rules of construction to interpret criminal statutes, the most prominent of which is the rule of lenity. Because these rules are judge-made, however, their application can seem random. And they may conflict with other rules of construction, such as the admonition in the RICO statute that its terms are to be liberally construed to effect its remedial purposes.[25] Reform of the federal criminal code affords an opportunity to establish uniform rules that courts can apply in construing federal criminal statutes.

Two such rules are worth highlighting. First, the rule of lenity--that doubts about the scope of a criminal statute should be resolved in the defendant's favor--should be codified and made applicable to all federal crimes. The rule of lenity, especially in conjunction with a strong mens rea requirement, gives meaning to the basic constitutional requirement of "fair warning."

Second, courts often struggle to determine the reach of a criminal statute's mens rea element. Does the requirement that the defendant act "knowingly," for example, extend to all aspects of the conduct that makes up the offense? Does it extend to jurisdictional elements, such as the use of

[25] *See, e.g., United States v. Turkette*, 452 U.S. 576, 587 & n.10 (1981); *United States v. Banks*, 514 F.3d 959, 967-68 (9th Cir. 2008).

interstate commerce? Does it extend to circumstances that make the conduct criminal, such as the age of a victim of sexual misconduct? Does it extend to elements that affect punishment, such as the quantity of drugs involved?[26] Many of these difficult questions of interpretation can be resolved with a simple, generally applicable rule that the specified mens rea applies to all elements of the offense unless the statute creating the offense specifically provides otherwise.

These and possibly other straightforward rules of construction will increase uniformity--and thus fairness--in the interpretation of federal criminal statutes. They will also conserve judicial resources that are now devoted to interpreting federal criminal statutes on a case-by-case, ad hoc basis.

V. ESTABLISHING A RATIONAL SYSTEM OF PUNISHMENT.

Finally, revision of the federal criminal code affords an opportunity to rethink punishment. Most significantly, the use of mandatory minimum sentences should be carefully reviewed and, in my view, abandoned or greatly restricted. Mandatory minimum sentences are a harsh, blunt tool that

[26] For examples of the Supreme Court struggling with this interpretive task, see *Fowler v. United States*, 131 S. Ct. 2045 (2011) (analyzing intent element of federal witness tampering statute); *Staples v. United States*, 511 U.S. 600 (1994) (analyzing mens rea for 26 U.S.C. § 5861(d)).

leads to the prolonged incarceration of many men and women who could be punished and returned to society through less draconian means.

It is worth considering as well other means of reducing the bloated federal prison population without diminishing deterrence or jeopardizing public safety. Among the possible reforms worth considering are the re-institution of federal parole, expanding the amount of "good time" a federal prisoner can earn, and increasing the power of federal judges to reduce or alter the conditions of federal prison terms in light of certain hardships. Through these means or others, federal prisoners who have received just punishment and present no danger can return to their families and become productive members of society, rather than a burden on taxpayers.

Mr. SENSENBRENNER. Thank you very much, Mr. Cline.

The Chair will now recognize Members under the 5-minute rule, and I will start by recognizing myself.

One of my goals in this effort is to try to avoid the traps of having an omnibus revision of the criminal code becoming a debate on numerous criminal justice policies, from the death penalty to mandatory minimums to disparate sentences and the like. So in order not to repeat the record of failure of past attempts to revise the criminal code over almost 50 years, I am trying to have at least the first attempt at this be policy neutral.

I would like each of the four witnesses to give us some advice on how to try to keep it policy neutral, because if it is not, I think this effort will go down in flames, just like the previous ones.

Mr. VOLKOV. Thank you, Chairman Sensenbrenner.

I see this as the most important principle, which is to stay policy neutral, because there are so many issues that have to be addressed with regard to drafting, with regard to inconsistencies, with regard to penalties, that we need to get a foundation document that is almost like the beginning of building a house that is clear and is done in the right way, with technically making the right choices, and consistency.

From that point, everybody can then debate the issues. What is the right penalty? Should we have a death penalty?

But we first need a document that make sense. And the way to do that, and I share the recommendation of some type of body. And you started the anti-trust modernization commission back in 2006, when we did the Department of Justice reauthorization bill. That would be some model that could work for rewriting the code in a policy-neutral basis. Just make that their charge and get a group of people together who are experts in the field to do that.

Mr. SENSENBRENNER. Ms. O'Sullivan?

Ms. O'SULLIVAN. Thank you for an excellent and challenging question.

What I would suggest is that you begin with what I think Roger mentioned as the general part, which is addressing the sort of default rules for statutory construction, maybe legislating the rule of lenity.

But also providing default provisions for mens rea, definitions of mens rea, definitions of when omissions are actionable or not actionable. So you could deal with a lot of the endemic problems of the code by articulating a general part, much like the ALI's Model Penal Code, that would be sort of neutral, because there would be no context. It applies to drug cases; it applies to white-collar cases, right? So you would be forced, people would be forced to deal with these issues in the abstract on a criminal law basis rather than a political or public policy basis.

Mr. SENSENBRENNER. Thank you.

Mr. Fairfax?

Mr. FAIRFAX. I agree with both suggestions, Mr. Chairman. I would really urge the idea of having a separate entity, a body with broad representation, perhaps undertake a first cut at a lot of these issues. I think it is much better to have things that perhaps do not even seem like they are controversial in the first instance, but that later turn out to be somewhat controversial taken up by a commis-

sion or by a group in the first instance, rather than for the first time in the course of legislative debate. I also agree with Mr. Volkov.

Mr. SENSENBRENNER. Thank you.

Mr. Cline?

Mr. CLINE. Mr. Chairman, I think true policy neutrality is hard to obtain. I think in almost any judgment, for example, about mens rea, there are policy judgments that need to be made.

I think the best way to achieve a politically acceptable result is to have the sort of commission that Mr. Fairfax talked about. I am on the ABA Criminal Justice Standards Committee. We have prosecutors, defense lawyers, judges, stakeholders, who meet and try to agree on standards. I think that approach is probably the best way to get to a result that could actually be enacted into legislation.

Mr. SENSENBRENNER. Thank you very much.

I yield back the balance of my time.

The gentleman from Virginia, Mr. Scott?

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Fairfax, you mentioned a couple times the idea of being smart on crime. Compared to what we are doing on drug abuse, what would be a smarter approach?

Mr. FAIRFAX. Well, you know, it is interesting. A lot of innovation is taking place right now in the States. And I have been involved with the American Bar Association Criminal Justice and State Policy Implementation Project. And the goal of that project is to show States how they can enhance public safety, reduce crime and recidivism, enhance justice and fairness, and save the taxpayer dollars, which is a win-win-win across the board.

And States that have been successful in working in this area have looked at changes to their sentencing policies in the same way that legislation that I know you have cosponsored in the Smarter Sentencing Act. And then also with regard to reentry of ex-offenders, Michigan, for example, through their prisoner reentry initiative, has slashed their budget for corrections and has reduced the overall number of prison beds that they need.

So I think there are lots of great ideas in the States, and I am starting to see them come up to the Federal level.

Mr. SCOTT. There have been several mentions of mandatory minimums. How do mandatory minimums comply with a smart-on-crime approach?

Mr. FAIRFAX. Well, I think that the legislative trends we are seeing right here in the Congress, again with the Smarter Sentencing Act, is really starting to take that question head-on.

I was actually very heartened a couple weeks ago. I know that you, Mr. Scott, were present at a roundtable at which Attorney General Eric Holder, Senator Mike Lee, Senator Rand Paul, Senator Sheldon Whitehouse, participated in a discussion about these very issues, mandatory minimum sentences. And all of the aforementioned individuals have either cosponsored legislation or supported a new approach to mandatory minimums. And I think that that is the trend that we are seeing.

Mr. SCOTT. Ms. O'Sullivan, did you want to comment on that, and also on the value of having all the criminal code in one place, what the value of that would be?

Ms. O'SULLIVAN. I would be delighted to.

I think mandatory minimums are wasteful and unjust. They do not permit the kind of even rough estimate of culpability that is necessary to a fair justice system. And I think that they also target certain populations.

In any case, the second part of your question was?

Mr. SCOTT. Putting all the——

Ms. O'SULLIVAN. What benefits there are.

It is not just tidiness—right?—that argues for a tight and discrete code. I can tell you that, as a former prosecutor, it is almost impossible to figure out the obstruction chapter. It is overlapping. It is confusing. It makes no sense.

It also, for example, you can charge the same crime under a 20-year count or a 10-year count or a 5-year count, which gives prosecutors a lot of power that can be used for good or ill.

And so I think that it is a much more efficient—you do not have prosecutors making mistakes. You do not have things being cleaned up on appeal. Everybody knows what the rules are. You have notice. And then are able, once you have this code, to make thoughtful judgments about relative culpability.

So, for example, in my article I talk about these two statutes. One statute is fleeing from an INS checkpoint. The other statute outlaws female genital mutilation. They are both 5-year counts. That makes no sense. But you do not know that until you have a code that you are able to sit back, look at the sections, and say, how culpable is this?

So, for example, obstructing a judicial proceeding is a 10-year count. Did you know that obstructing a congressional investigation is only 5 years? I do not know why there is a disparity. [Laughter.]

Mr. SCOTT. I want to get in one more question.

Mr. Volkov, I wanted to give you an opportunity to go through your principles that you did not have an opportunity to do.

Mr. VOLKOV. Actually, that was the first point I wanted to make. With regard to the principles, and I know I am preaching to the choir here, but there has to be a single Committee in the Congress that supervises, reviews, and legislates with regard to criminal offenses.

Right now, we have other Committees that put criminal offenses into the code, and it is an absolute disaster. And we had to fight that on the staff all the time. And right now, we need to get all of the criminal offenses that are all throughout the code, and bring them into Title 18, and let the Judiciary Committee supervise it and monitor it.

Mr. SENSENBRENNER. The gentleman's time has expired.

The Chair of the full Committee, the gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Volkov, I like the way you think about that, and I have a pretty good idea which Committee should have that responsibility for all aspects of the criminal code. [Laughter.]

Mr. GOODLATTE. I would like to ask all of you to talk a little bit about drawing the line between where something should be civil and regulatory, and where should it be a criminal offense.

Before we get into figuring out what kind of consistency we can have with regard to mens rea, I think we also need to think about what kind of consistency we need to have or can have, if possible, between what things should be civil and regulatory, and what things should be criminal offenses.

So I will start with you, Mr. Volkov, and we will go right across. You can tell me how to draw that line.

Mr. VOLKOV. I think that goes right to the work that you have been doing up to this point, that the Task Force has been doing, which is we get to criminal offenses versus civil offenses based on the impact or the action, the conduct or the failure to act, and the requisite intent. That is how we do it.

We do not say that, for example, something that you have no responsibility for but occurred on your watch, or you had nothing to do with it, that you should be criminally punished for it. There are civil obligations that can come up in that context, if you have a duty to act.

But before we make something criminal, there has to be an important part of conduct that we are trying to protect and prevent; and number two, that there is a culpable state of mind. And you always have to be consistent with that.

And what has happened, as you all know from all of your work up to now, is that issue has been diluted. And it has been diluted down to such a point that Congress does need to act in some respects to fix the intent issue.

Mr. GOODLATTE. Thank you.

Ms. O'Sullivan?

Ms. O'SULLIVAN. I very much agree with Mr. Volkov's comments. You would have to look at the harm, culpability, and the mens rea.

I have to say this is a particularly important question in the regulatory sphere. As you know, Congress very frequently delegates the authority to formulate regulations to an agency and then in advance provides that any knowing violation of the future regulation constitutes a crime.

Mr. GOODLATTE. So we are creating a crime without knowing what crime we are creating.

Ms. O'SULLIVAN. Exactly. We do not know what the content yet is.

But more seriously, I do not think anybody is going to count the number of criminalized regulatory offenses. I think at last count there were 300,000. That strikes me as crazy.

Also, the courts have interpreted "knowingly violated" to mean know that you are doing the conduct that violates the provision, not that you knowingly violated the law, but that you knowingly shipped sulfuric acid without the right label on it. People can go to jail. That is a felony offense.

That is a problem, and that language is used, and that Supreme Court interpretation of that language, is used consistently across all of these regulatory offenses. So that persons who are mixing two types of turpentine, or not making scaffolding in compliance with OSHA regulations, could actually go to jail.

Now, we know they are not all going to do that. We do not have the resources to pursue all those people. But the problem is, the prosecutors—and I was one, so I trust them, for the most part—

but they get to pick and choose. And you obviously have potential there for arbitrary and discriminatory enforcement. You have almost guaranteed it.

Mr. GOODLATTE. Mr. Fairfax?

Mr. FAIRFAX. I do not have much else to add, other than to say that this actually connects to the initial point, which is what body, perhaps even within Congress, should have responsibility for implementing, for drafting, and passing criminal laws. Whether it is an exclusive jurisdiction arrangement or referral arrangement, as was discussed in the Heritage and NACDL "Without Intent" policy paper, or whether it is a criminal law revision commission within Congress, as was suggested, I think those types of solutions can help to address that problem.

Mr. GOODLATTE. Thank you.

Mr. Cline?

Mr. CLINE. I think part of the problem, part of the reason we are here, is that whenever there is a crisis, the first reaction is to enact new crimes to address problems. That is what has led to all the overlapping crimes that we have, at least in part.

I think the analysis should work the other way. I think the first question should be, is an administrative or civil film civil penalty provision, something along those lines, sufficient to deal with the problem? And only if it is not, then proceed to look to criminal legislation.

I think the analysis is on its head right now. It needs to be reversed.

Mr. GOODLATTE. Thank you, Mr. Cline.

Mr. SENSENBRENNER. The gentleman from Michigan, Mr. Conyers, the Chairman *emeritus* of the Committee.

Mr. CONYERS. Thank you, Mr. Chairman.

This is one of the more important discussions we have been having on this Task Force, and I commend the Chairman for inviting these witnesses that are here. And I hope that I can work with him on his legislation, which to me presents a few problems that we will get into at the appropriate time.

Let me say that, Professor O'Sullivan, and anyone else can join in afterward, you talked about creating a standing commission or task force to reform the criminal code all at once, so that we can begin this work. And I see that as an enormous challenge in the legislative system in our country.

Might you and others comment about who might be, what kind of person would be on this commission?

Ms. O'SULLIVAN. Yes. Thank you for the question.

One concern is constitutional. Obviously, the creation of the Sentencing Commission sparked a great deal of litigation about whether, constitutionally, you can vest the power to create sentencing in an independent agency. So I am very aware that the Committee would have to confront how much you could actually delegate, and the like.

I think that you would have to have a situation much like the commission, where you have judges, you have practitioners, and here, obviously, you would have to have Members of Congress who participate.

I would see it as a fairly broad ranging group with a variety of experience and expertise.

Mr. VOLKOV. Could I comment?

I actually do not see the commission as being that broad. I clearly would not recommend going toward another Sentencing Commission, because we have a commission which is dealing with nonbinding type of guidelines these days, and I do not think that there is any reason to go to that.

I do think, though, an expert group of practitioners, defense counsel, judges, prosecutors, sitting in a room and saying—the last time the code was reviewed, Mr. Gainer put one woman in a room and had her go through every page until she was finished. Six months later, she came out with, "Here is everything that I found," in the 1980's.

We need a group of practitioners, just put us in a room and say get the job done. No elaborate commissions. Not a lot of money. And just get a group of people and do the work.

Mr. CONYERS. Interesting.

Anyone else want to comment? Yes, sir?

Mr. FAIRFAX. So I would say, I actually think that the balance of representation we saw on the Brown commission was relatively well thought out. I would say that there would need to be more representation. I agree with Mr. Volkov that there would need to be more representation from the practitioner community, and particularly from career and political folks at DOJ, because what happened in the aftermath of the Brown commission is that there was not buy-in from the executive branch, and that produced an executive bill. And I think that the goal is, particularly if you want to pass this in the lifespan of one Congress, is to have one bill from the outset. And I think getting the engagement and the buy-in of all stakeholders early on is essential.

Mr. CONYERS. Thank you so much.

Let me ask, Attorney Cline, do you have any thoughts about how prosecutors overcharge and the consequences of such a practice, even when a jury decides to convict only on a few counts?

Mr. CLINE. I do. Thank you for asking that question.

It is a real problem. I understand why prosecutors want to do it. They are advocates, and they want to win their case. But what happens is, the same course of conduct is charged in a whole series of counts. Jurors are not told the consequences of a partial conviction. They think they are giving the defendant a break, or maybe splitting the loaf by convicting on some and acquitting on others. But under the sentencing guidelines, and under the sentencing practices, generally, a conviction on one count is really no different than a conviction on every count. So the defense lawyer has to pitch a no-hitter, in essence, if he wants to win the case.

Jurors do not know that, and the result is compromised verdicts that pose real problems.

Let me give you an example of a prosecuting agency that does it in what I would say is the right way. The Antitrust Division, when they bring a price-fixing case, a Sherman Act case, they typically charge one count—just one count. And so the jury has an up or down decision, guilty or not guilty.

That is the fair way to do it. But the multiplication of offenses now makes it very rare that that occurs outside the antitrust context.

Mr. CONYERS. Thank you very much.

Thank you, Mr. Chairman.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Alabama, Mr. Bachus.

Mr. BACHUS. Thank you.

Professor O'Sullivan, you had talked about some of us focus on one thing, others focus on other things. I think that is true.

I will tell you, though, that the harsh sentences, I think there is general agreement that some of the longer sentences are actually not working. They are probably causing harm. They are almost institutionalizing or causing young people to become criminals, and our system is failing for it.

I think some of the hard questions are plea-bargaining. I have gone back and I have talked to defense attorneys. I have talked to prosecutors. Prosecutors say to me, and I used to be an assistant attorney general, we have to plea-bargain, and if you take this away from us, we are not going to be able to get people to plea.

But they are pleading for the wrong reasons. They are pleading not because they think they are guilty, a lot of times, but because if they plead, it is just 6 months and a misdemeanor, sometimes. If they try the case, it can be 5 years or 10 years imprisonment. And Mr. Cline, as he said, there are actually examples of people who are offered 6 months or a year and no time served who refuse to plead because they really thought they were innocent, and were indicted on 15 counts, were found innocent on 14 of those with the offer out there of a year and a day if they pled, and went to jail for 5 years.

And the jury, there was a case in Birmingham I am aware of, because it was widely reported, where that the jury came out and congratulated the defendant's family. Yet they convicted him on one count and he went to jail for 5 years. And some of the jury said we had no idea here. We thought that was one of the more minor charges.

We are talking about discretion, how much discretion to give judges, everything from complete to no discretion. No discretion has been a failure. I think it is how far do we leave it until we obtain it.

But let me emphasize something else. There is also a problem that we have as Members of Congress, and we have dealt with this on the civil and criminal side, we pass a law and then the regulators or the agencies decide that they are going to make it a crime. We pass a statute, and I am not even sure we have that realization.

I was Chairman of Financial Services. We passed things and suddenly read they are using those things in the criminal courts. We never even imagined that we were passing a criminal law.

So I think you have to take some discretion away from the agencies, like OSHA, EPA.

Finally, let me say this, one of the most complex things, and I am a Congressman from Birmingham, Alabama, so I feel like I am handling a stick of dynamite, it is obvious when you look at the

numbers, the high incarceration rate for young Blacks. It is kind of difficult for us to talk about.

That is a very complex issue, and I do not believe there is an intention with 99 percent of prosecutors and judges to be racially motivated. I really do not. I think with the cocaine, crack, that obviously resulted in a terrible problem.

But if you listed the reasons, there would probably be 50 reasons why incarceration is higher among young Blacks, even the presence of police. I can drive through my suburban community and not see a police car. There is no police presence. You can drive through some areas, and there is a police car every two blocks, just a high concentration of police officers. The crime, the violent crime in those communities, the higher evidence of that.

So I do not know how we address that. I know some of it I think is we approach it not as a criminal matter, but more as an educational matter, or divert some of these cases.

But that is something we have to look at.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentlewoman from California, Ms. Bass?

Ms. BASS. Thank you, Mr. Chair.

And thank you for your testimony today.

It seems like the panel kind of agrees that the way we should go about this is an outside commission, although I think you were describing a committee inside as well as outside.

Mr. VOLKOV. No, I actually share the same—whether you want to call it a commission or whatever, we need to have all of the practitioners in the room, and their charge is to come up with a document that makes sense, instead of having overlapping crimes, enabling stacking by prosecutors, all of that. We need to have one rational document to work from.

Ms. BASS. I guess you were saying, then, on the Judiciary Committee, that when other Committees pass laws, they should all come through here.

Mr. VOLKOV. Right. And that is probably one of the most important recommendations I can make, because as a staff member here, we had to go and fight other Committees that were legislating crimes, and they really did not know what they were doing. In this Committee is a repository of knowledge, history, expertise, that every criminal offense that is enacted in this country should be reviewed by the Judiciary Committee, enacted, and you can have successive referrals if they want to look at it, too. But we all spent too much time watching the territory to make sure that things were not done stupidly by other Committees, to be honest with you.

Ms. BASS. Are you suggesting Members of Congress did not know what they were doing? [Laughter.]

Mr. VOLKOV. I am telling you——

Ms. BASS. You do not need to respond to that.

Mr. VOLKOV. Ms. Bass, we were brought into situations where a Committee would bring to the floor, okay, all of a sudden on the floor of the House were 25 criminal offenses being added to the criminal code in different statutes. Mr. Vassar and I had to run immediately to the parliamentarian and say, what is going on, go to the Committee, argue with the Committee, and tell that Committee to remove the amendment from the floor.

Ms. BASS. Okay. Let me ask about a couple situations.

I really appreciate, Ms. O'Sullivan, the way you were describing the differences in values and goals coming from two different directions, and I would certainly want to associate myself with the side that is concerned about over-incarceration, especially with the drug laws, especially now, in light of drug laws changing within the States. So when it comes to purpose of mind, I just want to ask in terms of directionthat the Committee was going with the draft, how do you think a situation would be viewed—this is hypothetical, although there were a lot of cases, in particular with women who were involved with men, examples of females being a blind mule, not knowing that they were being asked to transport drugs. I do not know if that falls into what you were saying, in terms of being blind, I believe, is the way you described it.

Or a female who might be stuck in an abusive relationship. There are drugs in the house. The house is raided, and she is caught up as well.

Ms. O'SULLIVAN. That is a difficult thing to legislate. That strikes me as something that is quintessentially a prosecutorial judgment, but it is one that has to be an educated judgment. I am not sure that the mule problem is restricted to women, although certainly a big issue.

I actually had a defendant who was 18. He took a gym bag from point A to point B. He had no idea—he probably knew it had drugs in it. He did not know what type. He did not know how much. He got five bucks for it. And he was looking at 10 years.

One thing you could do in the drug area is require proof, provide gradations of offenses by amount and type, and require the person to know what type of drug they are carrying and approximate quantities. Right now, people get sentenced for whatever type or quantity actually exists, and they do not have to know how much. But it is relevant to culpability.

May I just add one thing to what Mr. Volkov said?

Ms. BASS. Sure.

Ms. O'SULLIVAN. As far as the commission, I think this Committee is really busy. I assume that you are already fully tasked. So that is one of the reasons I propose—I did not necessarily mean a totally independent committee, more of a commission that is sort of advisory to you all.

So, for example, if the SEC issues regulations, before you vote to criminalize them, that commission would review them, so you do not have to review all that stuff, and advise you on what they think is appropriate.

It would be helping this group do what they needed to do, because what we are all proposing that you do is probably the work of 20 people forever.

Mr. SENSENBRENNER. The gentlewoman's time has expired.

The gentleman from Texas, Mr. Gohmert?

Mr. GOHMERT. Thank you, Mr. Chairman. And I thank each of you for being here and for your insights.

Mandatory minimums have been, obviously, quite controversial over the years. When I was a judge, a district judge, handling State felonies, I had absolutely no problem with being given a wide range of punishment and let me have the discretion to consider all of the

factors and set a punishment within that range. But I get the impression that if we completely eliminate mandatory minimums, that means the range will always be from no punishment whatsoever to whatever cap we want to put on them.

Are any of you advocating that for everything that Congress makes a crime, there should be the possibility of absolutely no punishment whatsoever? Or is it okay to have a range and give judges that discretion?

Mr. CLINE. I will be glad to start. I think mandatory minimums are a bad idea, pretty much across the board.

Mr. GOHMERT. My question was about having a range, because when we talk about mandatory minimums, that may completely eliminate having anything as a bottom for a range. So my question is—so we do not get into, "Well, what does he really mean by mandatory minimums?"—do you have a problem with a range being set by Congress and giving the judge discretion within that range, or is it your adamant contention that there should never be a crime which the least punishment is not nothing, no punishment whatsoever? You want that as a possibility in every single crime, is that correct?

Mr. CLINE. I think it is. And I say that——

Mr. GOHMERT. So every State that has ranges of punishment, like in Texas, third degree, 2 to 10; second degree, 2 to 20; first degree, 5 to 99 years or life. Texas is completely wrong in having that minimum of 2 or 5 years? That is your contention?

Mr. CLINE. Well, I hesitate to say that Texas is wrong about anything. I am a Texas law graduate. [Laughter.]

But let me say this, I think that Federal judges in the pre-guidelines era, and since the guidelines became advisory, have demonstrated that they have the ability to impose rational and fair sentences without mandatory minimums.

Mr. GOHMERT. Absolutely. Most of them do. Most of them do.

Mr. CLINE. I disagree with plenty of sentences, but most Federal sentences do not carry mandatory minimums, and you do not see very many serious offenders getting away with——

Mr. GOHMERT. Yes, but you get into the range, and I remember when the Sentencing Commission came in, Federal judges were absolutely livid that their discretion was being hampered like that. And then I was shocked 10 years later to find many of them liked not having to make the tough calls, and it narrowed their decisions and made sentencing so much easier. I was shocked.

Mr. CLINE. I think where the guidelines stand now, which is advisory, a factor to be considered, but not mandatory, I think Federal judges, I am guessing, find those to be of real value.

Ms. O'SULLIVAN. May I add something?

Mr. GOHMERT. Yes.

Ms. O'SULLIVAN. I am a fan of mandatory guidelines. I actually wrote probably the only article defending the guidelines. I do not think judges are born with some wisdom that the rest of us do not possess. And I think that the evidence of racial and gender and other really unacceptable disparities that existed prior to the guidelines really were shocking. And actually, if you look at the statistics since the guidelines have become advisory——

Mr. GOHMERT. My time is about to expire, and I want to ask one other thing very quickly.

With regard to regulations, I appreciate what you say. I ca not think of a regulation that I think we ought to make a crime without Congress ever considering it. Don't you think there should be no regulation ever being a crime without Congress actually voting to make it a crime? Does anybody disagree?

Mr. VOLKOV. I agree.

Ms. O'SULLIVAN. I agree.

Mr. GOHMERT. And if we make it a requirement that any bill that has a criminal penalty has to come through Judiciary, I think that would help a lot. A bipartisan problem has been both sides of the aisle, when we want to show we are really tough on something, then throw a criminal penalty. And it has resulted in vast injustice.

And I appreciate all of you bringing that forward.

Mr. SENSENBRENNER. Well, now we have found where there is policy agreement, so let's keep on with this roll.

The gentleman from Tennessee, Mr. Cohen?

Mr. COHEN. Thank you, Mr. Chairman. I do thank you for putting this together.

I do not necessarily agree with the concept that we could not agree, and I may be wrong. Most of you all have been here a lot longer than me. But I think what the ACLU is interested in, and what I think what maybe Professor O'Sullivan said Republicans are looking at, that we could all agree on it, that there is a lot of white-collar crime that should not necessarily penalized as it is, and there are a bunch of people being put away for drugs that should not be either.

And we all value liberty. That is one thing we come together on. And taking someone's liberty is a serious offense, and it is a costly offense, $30,000 a year.

So I think we could work together on the policy.

Professor Fairfax, you are familiar with the controlled substances schedules, I presume? Do you think they may make sense?

Mr. FAIRFAX. Well, I think that as part of the project of looking at the Federal criminal code, a reconsideration of the controlled substances schedule would be in order. But I think that raises one of the points made earlier, that we really need to rely on expertise, right? And we need to supply to the Committee and the Congress——

Mr. COHEN. But you think there are problems with the controlled substances, or do you think it is all logical?

Mr. FAIRFAX. Well, not necessarily all logical. So I think that there can be differences of opinion with regard to the schedules.

Mr. COHEN. Do you think marijuana should be in the same class as heroin?

Mr. FAIRFAX. Again, my mother is a pharmacist and has much greater expertise, and I have neither never used either substances, but I can tell you——

Mr. COHEN. You do not have to use the substances. [Laughter.]

Mr. FAIRFAX. I know, but so again——

Mr. COHEN. You probably know some people that have used one of the substances more than the other. [Laughter.]

Mr. FAIRFAX. But I do think that a rational approach to making gradations among the various controlled substances, and determining which substances even belong on the schedule, should be part of the conversation, yes.

Mr. COHEN. Mr. Cline, Attorney Cline, do you have a thought about it?

Mr. CLINE. First, I want to ask for immunity for Mr. Fairfax. [Laughter.]

Mr. FAIRFAX. I do not need it.

Mr. CLINE. I think the drug laws are a mess, partly because of the substantive provisions and the way different substances have been lumped in together, largely because of the mandatory minimums, which just produce these ridiculously harsh sentences and distort the whole rest of the system.

There was a discussion about plea-bargaining. When a prosecutor has as a mandatory minimum in his back pocket, the plea-bargaining is going to take a much different form than when he does not. And it is going to produce, in many cases, an unjust result.

Mr. COHEN. And, Professor O'Sullivan, you said that you are one of the rare people who support the guidelines, and I am against any racial, ethnic, blah, blah, blah. But is not the effect of that is that there is now injustice for all, rather than just for most?

Ms. O'SULLIVAN. I do not actually think so. I think, yes, they are too harsh, but they are too harsh because the statutory maximum, they are built on the statutory maximum that Congress set. I am not accusing you. But I think if Congress decided to scale down the penalties, there is nothing inevitable about the amount of time that the guidelines provide for.

What I like is the structure, that there is a guaranteed set of considerations that we view as necessary to a particular sentence. It is relevant how much loss there is for fraud.

And I just think that we are all human. And it used to be, and it is now today, true, that if you walked into courtroom A and this judge thought antitrust was terrible, you could get 20 years. If you walk into courtroom B and this judge does not have a problem with it, you can get probation.

Mr. COHEN. As you said, we are all human, and every case has individual factors. What if one person had a certain drug—marijuana—and the second person had it, and they both possessed it in same quantity, but one person had it because their spouse was dying, and the State had not allowed medical marijuana, but the spouse needed it and wanted it. And the other was doing it because it made their dinner better. Do not you think the judge should be able to distinguish in those cases?

Ms. O'SULLIVAN. And there are two ways you could do it under the guidelines. You could do it by looking where within the range you should sentence people, and you could depart. The original contemplation of the guidelines was that departures would be freely given based on offender circumstances because offender circumstances could not be reduced to formulas the way——

Mr. COHEN. Let me go to your favorite subject. You wrote about the Honest Services Act. I have to admit, I have not read you law review article, which maybe I should.

Do you give a proposed statute to cure the problem with honest services there?

Ms. O'SULLIVAN. No.

Mr. COHEN. Thank you.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Idaho, Mr. Labrador?

Mr. LABRADOR. Thank you very much for being here today.

And, Mr. Chairman, thank you again for this I think very important Committee. It is one of my favorite things that I am doing here in Congress.

But Justice Scalia said a few years ago that maybe we should take more cases to trial, that one of the problems with our criminal system is that we do not have enough incentive to go to trial. And I believe, as a conservative, that what he was talking about is I think what Mr. Cline said, or somebody said, that liberty should be a very difficult thing to take away from an individual.

Our Constitution was not contemplating a bunch of people in prison. Our Constitution, our Founding Fathers, were contemplating a very difficult time for the state to take somebody's liberty away.

So as we are contemplating redoing the criminal code, and all those things, how much should we consider that it should actually be more difficult to try cases, not easier to put people in prison?

Mr. VOLKOV. Well, I think that you are getting at a very big point. Remember this, only 7 percent of the Federal cases go to trial; 93 percent end up in a plea bargain. What is the best tactic that prosecutors have? I have been at meetings, I was a prosecutor for 20 years, it is called stacking.

You take the crime, you put as many offenses into it as he can, and you stack it up. I have had people and prosecutors tell me straight up when I was working up here on the Committee, I would say, why do we have this 18 U.S.C. 371 conspiracy? It is a 5-year maximum. They said, "Don't ever take that away. I stack it up and I use it for plea-bargaining leverage, so that I can take a case, and if I want to say, instead of charging a 20-year offense, a 10-your offense, and making someone plea to it, I will say, you know what? Your circumstances are not so bad. I will give you this 5-year offense."

They are dispensing justice, not the judge, in that circumstance. And I do not think that this Committee or Congress ever thought that that is the way the system was going to work.

Mr. LABRADOR. So I would take other comments from the rest of the panelists.

Mr. CLINE. I am happy to address that. There are so few trials in the Federal system these days because the prosecutor holds all the cards. The defense knows that. And so the plea-bargaining process is a very imbalanced procedure.

I am not saying do away with plea-bargaining. I think it is always going to have an important role.

Mr. LABRADOR. Correct.

Mr. CLINE. But when you have mandatory minimum sentences, you have a multiplicity of charges that can be brought against the defendant. You have forfeitures, often mandatory, that can ruin somebody financially. You have extremely harsh sentences. You

have vague doctrines like willful blindness that increase the chances of conviction.

When that is the arena and a defendant is looking at a choice between pleading guilty, even if he thinks he is not, and getting 2 or 3 years, and risking going to trial and perhaps getting 20 years and a multimillion dollar forfeiture, many defendants are going to decide to cut their losses.

I think to have more trials, many different interrelated aspects of the Federal system need to change in the direction of fairness.

Ms. O'SULLIVAN. I will just bring one other point up, because I do white-collar. I ca not remember the last time a corporation went to trial, because it is literally impossible for corporations to resist prosecutors these days, because of the fine, market value problems, all kinds of different kinds of penalties that are applicable to corporations, including debarment and suspension from government contracting or delicensing, like Arthur Anderson.

So I can tell you that the accepted wisdom in the defense bar is do not even think about resisting a Government overture for a plea in a corporate context.

And now the Government is just going with what are called D.P.s. They are not even resolving these cases criminally because that is too difficult. So the Department of Justice reaches a civil resolution.

Mr. LABRADOR. Thank you. Just for the Committee, I just think that is something we should think, especially on our side of the aisle, as conservatives, I think we should be very concerned about the state having so much power that criminal defense attorneys are afraid to go to trial, because they know that they take more risk going to trial than defending liberty and property, and the things that the Government should not easily take away from defendants.

But thank you very much. I yield back my time.

Mr. SENSENBRENNER. I am told that we will be voting between 10:20 and 10:30.

The gentleman from Georgia, Mr. Johnson?

Mr. JOHNSON. Thank you. It is not so much the sheer volume of criminal laws on the books and how they are apportioned among the various titles of the U.S. Code. It is really a matter of what is the impact of over-criminalization on society.

And I think that from the standpoint of how the Committee should approach this issue, I think we should do it in a piecemeal fashion as opposed to an overall solution, because it will simply take too much time to get at the worst aspects of over-criminalization.

In my mind, it has to do with the realm of drug prosecutions. And to piggyback on one of the issues that Mr. Labrador raised, the defendant's ability to take a case to trial, any time you can get a 2 percent to 3 percent offense level downward departure for acceptance of responsibility, then it means that if you go to trial, then you are going to be deprived of that downward departure.

And, in fact, you would probably end up at the top end, if you dared to go to trial and then testify. So you actually get punished for having a trial and taking the stand and testifying. You may do so because you feel like you are not guilty, but you end up getting punished on top of the base offense level and whatever criminal

history you may or may not have. You are going to get punished for going to trial.

So that is one thing that I can do pretty easily to address Mr. Labrador's concern.

But when it comes to the overall sentencing guideline concept, what we have is the transfer of discretion from the judge in terms of disposition, to the prosecutor in terms of charging. So a prosecutor can decide to charge a person with a crime that has a base offense level higher than perhaps one that would be better suited for the conduct alleged.

So with that prosecutorial decision having been made, then it limits the judge in terms of how to best dispose of the case, taking into mind the crime itself, the condition of the victims, the status of the defendant, or prior criminal history, those kinds of things.

And I think that we can get to those kinds of issues and address the problem that President Obama highlighted yesterday with his call for this My Brother's Keeper concept that would keep so many young Black males, would really enhance their ability to become first-class citizens of society, as opposed to this second-class citizenship, which some call Jim Crow.

Would anyone comment on that?

Mr. FAIRFAX. Thank you, Mr. Johnson.

Your comments raise a couple points. One is the issue of collateral consequences. That is a significant issue and it relates to what Mr. Cohen and I were discussing, and what Mr. Baucus alluded to in his earlier comments on the impact of collateral consequences, particularly on those convicted of lower-level, nonviolent drug offenses. It is just tremendous.

And there is a project under way right now under the auspices of the Department of Justice, and being conducted by the American Bar Association, to essentially catalog all of the collateral consequences in jurisdictions all around the country, so that practitioners and policymakers and lawmakers can understand the implications of the criminalization that they engage in when they make these criminal laws.

Mr. SENSENBRENNER. The gentleman's time has expired.

And last but not least, the gentleman from New York, Mr. Jeffries.

Mr. JEFFRIES. Thank you, Mr. Chair, and I thank the witnesses for their very thoughtful testimony.

It seems that as it relates to the problem of over-criminalization that this Task Force is encountering, there are potentially three areas of exploration as it relates to the problem we seek to address.

We have a tremendous explosion of the Federal criminal code, as it relates to regulatory offenses, as it relates to drug offenses spanning a wide spectrum.

You have limitations on judicial discretion, perhaps inconsistent with a view of an independent judiciary as a third branch but coequal branch of government.

And then I think a related issue that some of you have begun to mention, and some of my colleagues have talked about during their time, is prosecutorial overreach.

That third area, prosecutorial overreach, seems to be enhanced by or made more difficult by both an explosion of the Federal criminal code and a limitation on judicial expression.

And so I would be interested, and perhaps we can start with Mr. Cline, how do we deal with the problem of prosecutorial overreach and the imbalance or the harm that is caused by it, and the imbalance and the threat to liberty, when you have an overly aggressive prosecutor taking advantage of the explosion of Federal crimes, and, in certain instances, the limitation of judicial discretion?

Mr. CLINE. Let me start by distinguishing between prosecutorial misconduct and prosecutorial overreach. Misconduct is, for example, the failure to turn over exculpatory information, improper comments in closing arguments, that kind of thing. And I take it that is not what you are talking about.

What you are talking about, I think, is prosecutors as advocates using the tools they have to extort—I use that word advisedly—harsh plea agreements, to coerce defendants into not going to trial.

I do not view that, necessarily, as anything bad on the part of prosecutors. They are advocates. They want to win their cases, and they use the tools available to them.

The key is many of those tools I view as unfair. Mandatory minimums are a perfect example, but there are others as well—the whole doctrine of willful blindness, some aspects of the sentencing guidelines, forfeitures.

There are tools prosecutors have that they should not have. If you take those tools away, if you level the playing field, I think you will see many fewer instances of prosecutorial overreach.

Another example, by the way——

Mr. JEFFRIES. I appreciate that distinction. I want to hone in on it for a second, as long as things that can be done to deal with prosecutorial overreach.

As it relates to misconduct, the withholding of exculpatory evidence, for instance, do you think that the law currently has sufficient incentives built into it to punish or deter prosecutorial misconduct?

Mr. CLINE. Absolutely not. I realize that is not the topic of this hearing, but I feel very strongly that discovery reform is necessary. Brady is not working.

Mr. JEFFRIES. Professor O'Sullivan?

Ms. O'SULLIVAN. I completely agree. There have been scandal after scandal after scandal on the Brady front.

I agree with your point about prosecutorial discretion. The difficulty, of course, is that constitutionally it would be very difficult for Congress to constrain their discretion directly. And that is why we all think code reform is such a good thing, because you can affect their discretion by affecting what tools have.

Mr. JEFFRIES. Yes?

Mr. VOLKOV. The best way to constrain what you see as prosecutorial overreach is to have a clean code, a code that does not allow stacking, does not allow multiplicity of offenses.

One act can result in 10 charges. It should not work that way. You should have the ability to constrain that discretion.

One important point, though, when we go back to the guidelines, that has not been raised, is that Senator Kennedy was probably the

biggest proponent of the guidelines for fear of what he saw was racial discrimination in terms of the sentencing by judges at that time.

Mr. JEFFRIES. Now what is interesting about that question, I think you are going to have human error, and you are going to have human bias in any judicial system. And I think the one thing for us all to explore is whether we think that that human error, human bias, is more likely or more dangerous when vested in the prosecutorial area or whether it is more likely or more dangerous when found in the judicial branch.

And I think the Founders, at least, built a system in place as it relates to lifetime tenure that that was designed to mitigate out at least the possibility of human bias in the judiciary.

And that is something we should all think about, and I yield back.

Mr. SENSENBRENNER. The gentleman's time has expired.

I think that this has been another very interesting hearing that this Task Force has had with a lot of ideas.

I get back to the fact that I think that the challenge of getting this done is to have the first step be policy neutral.

So with that happy admonition, without objection, the Task Force is adjourned.

[Whereupon, at 10:27 a.m., the Task Force was adjourned.]